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V. 2953 No. 14933

**United States
Court of Appeals**
for the Ninth Circuit.

G. A. PEHRSON,

Appellant,

vs.

C. B. LAUCH CONSTRUCTION CO., a Cor-
poration,

Appellee.

Transcript of Record

**Appeal from the United States District Court
for the District of Idaho,
Northern Division.**

FILED

JAN 25 1936

No. 14933

**United States
Court of Appeals**
for the Ninth Circuit.

G. A. PEHRSON,

Appellant,

VS.

C. B. LAUCH CONSTRUCTION CO., a Corporation,

Appellee.

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**Appeal from the United States District Court
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

JAMES G. TOWLES,
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Kellogg, Idaho;

FRANK FUNKHOUSER,
1329 Old National Bank Building,
Spokane, Washington,

Attorneys for Appellant.

JOHN D. MacGILLIVARY,
507 Fidelity Bldg.,
Spokane, Washington.

HAWKINS & MILLER,
Coeur d'Alene, Idaho,
Attorneys for Appellee.

In the District Court of the United States for the
District of Idaho, Northern Division

Civil Action No. 1986

G. A. PEHRSON,

Plaintiff,

vs.

C. B. LAUCH CONSTRUCTION CO., a Corpora-
tion,

Defendant.

COMPLAINT

Plaintiff complains of defendant and for cause
of action alleges:

I.

Plaintiff is a citizen of the State of Washington.

Defendant is a corporation incorporated under
the laws of the State of Idaho.

The matter in controversy exceeds, exclusive of
interest and costs, the sum of three thousand dol-
lars.

II.

Plaintiff is now and for many years last past has
followed the profession of an architect, residing
and having his office at Spokane in the State of
Washington, and is now and at all times herein
mentioned has been duly licensed under the laws
of the State of Idaho to practice his profession as
an architect in the State of Idaho.

III.

On or about the 31st day of March, 1952, Class A School District No. 82, in Bonner County Idaho, a corporation of the State of Idaho with its headquarters at Sandpoint in said County and State, entered into a contract with defendant for the construction by it of a six-room one-story brick elementary school building, with wood frame, flat roof, for the Cocolalla area of said school district situated at Cocolalla in Bonner County, Idaho. Prior thereto plaintiff was employed by said school district as an architect to prepare plans and specifications for said school building and to supervise its construction for the purpose of seeing that it conformed with the plans and specifications prepared by plaintiff, and it was plaintiff's duty during the course of the construction of said school building, on request of said school district, to immediately inspect the construction work so as not to delay or retard its progress. For the purpose of constructing said building, said school district delivered to defendant possession of the site on which the building was to be constructed, such possession to continue until the work was finished and the building turned over to said school district.

IV.

During the course of the construction of said building and on or about the 12th day of September, 1952, at which time the said building was about 50% completed and the roof work and the roofing being installed thereon was about 90% completed, plaintiff while on a trip to inspect said school

building was notified by a trustee of said school district that the roofing as being applied was being improperly laid on the roof planking by defendant and plaintiff was directed to forthwith proceed to inspect the same and to check other portions of said building. Thereupon plaintiff checked some work on the first floor of said building accompanied by said school trustee who then directed plaintiff to inspect the roof.

V.

In order to get to the roof of said school building it was necessary to climb up a ladder to the left of the entrance of said school building and up to a concrete ledge forming a roof over the entrance to said building, and after getting from the ladder onto said concrete roof ledge, it was necessary to climb over a concrete parapet wall of said building about 8 inches thick to the main roof thereof.

Said concrete roof ledge over said entrance is about 13½ feet from the ground and projects from the main building wall about 3 feet; the top of the concrete parapet wall of said building is about 4½ feet above the top of said concrete roof ledge over said entrance and the main roof of said building is about 16 inches below the top of said parapet wall, which has a champered front edge sloping down toward the roof about 2 inches for drainage.

The standards of said ladder reached about a foot above said ledge and the top rung of said ladder was about level with the top of said ledge over said entrance.

VI.

The only means of access to the roof of said building furnished by said defendant was by means of said ladder. In order to reach said concrete roof ledge it was necessary to move the whole body from said ladder to said concrete roof ledge and to accomplish this it was necessary to stand with the left foot on the second rung from the top of the ladder and to move the right knee over onto the concrete roof ledge of said entrance. In order to maintain a balance of the body while moving from the ladder to the concrete roof ledge it was necessary to reach up and take a strong hold of the concrete parapet wall of the building with the left hand, then after the right knee was securely resting on the concrete roof ledge and with the balance of the weight of the body on the right knee, the left hand was moved over from the ladder to the concrete roof ledge and the hold on the concrete parapet wall above was released. After transferring the entire weight of the body from the ladder to the roof ledge, it was necessary to take hold of the top of the concrete parapet wall of the main building above the concrete roof ledge with both hands and hoist one's self over the parapet wall and onto the roof of the main building. In order to reach the ground from the roof, it was necessary to follow the reverse of said movements.

VII.

At said time in question, to wit, on September 12, 1952, said trustee of said school district preceded plaintiff up said ladder going through said move-

ments aforesaid and safely reached the roof. As soon as said trustee was off the ladder and on the roof, plaintiff proceeded to climb up said ladder and upon reaching the top of the ladder, plaintiff stood thereon with both feet and holding onto the right hand standard of the ladder with his right hand, he reached up and took hold of the concrete parapet wall with his left hand, and while moving his right knee over and partly onto the roof ledge, said ladder began to and did move slowly to the left farther away from the concrete ledge, causing the fingers on plaintiff's left hand slowly to lose their grip and slip off the top of said concrete parapet wall, precipitating plaintiff onto a pile of broken concrete blocks and rubbish near the base of said ladder, and plaintiff was thereby rendered unconscious and his body was so bruised and injured that he became and was for a long time sick and sore and confined to his bed and to the hospital for a long period of time during all of which time said plaintiff suffered tormenting and excruciating pains and endured great mental and physical pain and anguish and that the injuries which plaintiff suffered as a result of the negligence and carelessness of defendant as hereinafter alleged are permanent and have and will permanently disable plaintiff in large part from attending to his business.

VIII.

It was the duty of defendant in the construction of said building to take all necessary precautions for the safety of employees and other persons right-

fully on the premises; to erect and properly maintain at all times as required by the conditions and progress of the work all necessary safeguards for the protection of workmen and the public; to allow plaintiff as the architect of said building to at all times have access to the work wherever it was in preparation or progress and to provide proper facilities for such access and for inspection and to at all times keep the premises free from accumulations of waste material or rubbish during the progress of the work, and that it was the duty of defendant to exercise reasonable and ordinary care to see that the premises were free from danger and to refrain from subjecting plaintiff in the exercise of his duties to unnecessary peril.

IX.

Said ladder was of light construction and inadequate for the purpose for which it was being used and was not fastened to said ledge, and that the position of said ladder against said concrete ledge and the complicated manner in which a person climbing said ladder had to adopt in order to successfully crawl onto said ledge and over said parapet wall and onto the roof of the main building constituted and created a dangerous situation and a grave and serious menace and peril to the life and limb of employees and persons rightfully on the premises and required to reach the roof of said building and particularly to this plaintiff.

X.

Defendant was negligent and careless in the use of said ladder in such position and place against said building as the only means of reaching the roof of said building and returning therefrom and in not keeping the ground in and about the base of said ladder free from broken concrete blocks and rubbish and other waste material. Defendant was negligent and careless in not taking the necessary precautions for the safety of those who rightfully had to use said ladder to reach the roof of said building and in failing to erect and properly maintain at all times as required by the conditions and progress of such work all necessary safeguards for the protection of the workmen and the public and this plaintiff and in failing to provide proper facilities for access and for inspection by plaintiff of said building and the roof thereon and all portions thereof and in failing to keep the premises free from accumulations of waste material and rubbish, particularly in and about the base of said ladder during the progress of the work, and in failing to exercise reasonable and ordinary care towards this plaintiff to see that the premises were free from danger and in failing to refrain from subjecting plaintiff to unnecessary peril.

XI.

Plaintiff alleges that he is an architect of long years of experience, 68 years of age at the time of his injuries, with a life expectancy of about eleven years, and at said time was earning and for a long

time prior thereto had been earning approximately \$20,000.00 per year and was capable of earning even larger sums.

Prior to said accident he was in good health, and a strong, robust man. He is fitted by education and experience for no other calling or profession. As an architect he is required to inspect and examine buildings of all kinds in course of construction and in order to secure business as such architect he must be physically fit and able to perform his duties as an architect. On account of his great and permanent injuries plaintiff is crippled and lame and will be prevented from earning his living in his profession in the future.

XII.

Plaintiff further alleges that as a result of his fall as hereinbefore alleged, he sustained a comminuted fracture of the right femur, to wit, a shattering of the bone in the region of the right hip and below the region of the hip, a fracture of the left clavicle or collar bone and two broken ribs and other painful bruises and contusions; that he was taken in an ambulance to a hospital at Sandpoint, Idaho, in an unconscious condition where X-rays showed a fracture of the right hip bone in three places and then removed by ambulance to a hospital in Spokane, Washington, where he was under the care of physicians and surgeons; that several operations were performed on plaintiff; that from the date of said accident he was confined to the hospital and to his home until about February 12, 1953;

that he was treated by means of wires inserted through the femur and tibia on September 13, 1952; on September 19, 1952, the operation for the comminuted fracture of the right femur was performed consisting of a 12-inch-long incision and inserting a metal plate 6 inches long, $\frac{1}{4}$ inch thick, and $\frac{5}{8}$ inches wide, and a metal bolt $\frac{5}{16}$ x 3 inches was screwed into his hip joint with 4 screws about 2 inches long, while the fractured clavicle was reduced by means of an open reduction and held in position with a figure eight stainless steel wire bolted to the bone; that when he returned to his home he had to use a walker for about two months, then crutches, and finally canes. That plaintiff's entire nervous system has been severely shocked and permanently impaired as a result of said injuries. During all of said time plaintiff suffered tormenting and excruciating pains and endured great mental and physical anguish and plaintiff now suffers and will continue to suffer for the remainder of his life great and continuous pain in the right hip and in the left shoulder which is aggravated by motion and that he is still under the care of physicians and surgeons and will be for a long time to come. Said wounds so negligently and carelessly inflicted upon plaintiff by defendant are permanent and the injuries which plaintiff suffered as a result thereof are permanent and have and will permanently prevent plaintiff from following the normal practice of his profession, and he will continue to suffer during all of his life great mental and physical pain and anguish.

By reason of the matters and things hereinbefore alleged, plaintiff has been damaged in the sum of \$100,000 on account of his pain, suffering, and injuries as aforesaid; that he has suffered and will continue to suffer a loss of earnings from the practice of his profession in the sum of \$220,000 and that he has also incurred in hospital bills, physicians' and surgeons' services, nursing, medicines and bandages, ambulance service, and X-rays and other similar services the sum of at least \$3,500.

Wherefore plaintiff prays judgment against said defendant for the sum of \$323,500 and for his costs and disbursements herein sustained.

/s/ FRANK FUNKHOUSER,

/s/ THERRETT TOWLES,

/s/ JAMES G. TOWLES,

Attorneys for Plaintiff.

[Endorsed]: Filed August 16, 1954.

[Title of District Court and Cause.]

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to serve upon James G. Towles, whose address is 107 Sidney Building, Kellogg, Idaho, or Therrett Towles, whose address is 1231 Old National Bank Building, Spokane, Washington, or Frank Funkhouser, whose ad-

dress is 1329 Old National Bank Building, Spokane, Washington, plaintiff's attorneys, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Dated August 16th, 1954.

[Seal] /s/ ED. M. BRYAN,
 Clerk of Court.

By /s/ LONA MANSER,
 Deputy.

Return on Service of Writ attached.

[Endorsed]: Filed August 18, 1954.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant and for answer to the complaint of plaintiff admits, denies and alleges:

I.

Defendant admits the allegations of paragraphs I, II and III of plaintiff's complaint.

II.

For answer to the allegations contained in paragraph IV, defendant admits that on September 12, 1952, the school building mentioned in said para-

graph IV was nearing completion and that on said date plaintiff visited the premises on a periodic inspection trip. Defendant does not have sufficient information upon which to form a belief as to the other allegations of paragraph IV and, therefore, denies the same.

III.

For answer to paragraph V, defendant admits that there is a concrete roof ledge over the entrance to the building about 13½ feet from the ground, projecting from the main building wall about 30 inches; that the top of the concrete parapet wall of the building is above the top of the concrete roof ledge, and the main roof of the building is about 16 inches below the top of the parapet wall with a champered front edge sloping down toward the roof about 2 inches for drainage. Defendant denies the other allegations contained in paragraph V.

IV.

Defendant denies the allegations contained in paragraph VI of plaintiff's complaint.

V.

For answer to paragraph VII defendant admits that on September 12, 1952, while attempting to climb a ladder from the ground to the roof of the school building being constructed by the defendant, the plaintiff sustained a fall to the ground. Defendant does not have sufficient information upon which to form a belief as to the nature of plaintiff's action immediately preceding his fall, as to the cause of

such fall, or as to the nature and extent of alleged injuries suffered by plaintiff as a result thereof, and for that reason, denies all other allegations of said paragraph VII.

VI.

For answer to the allegations contained in paragraphs VIII, IX and X of plaintiff's complaint, defendant denies that it was guilty of any negligence or breach of duty owed by the defendant to plaintiff as alleged in said paragraphs and denies that any alleged negligence or breach of duty on its part was a proximate cause of plaintiff's fall or of the injuries allegedly sustained by plaintiff as a result thereof.

VII.

For answer to the allegations contained in paragraphs XI and XII of plaintiff's complaint, defendant admits that as a result of his fall on September 12, 1952, the plaintiff sustained certain injuries and losses and incurred certain medical and hospital expenses. Defendant does not have sufficient information upon which to form a belief as to the nature and extent of such injuries, losses and expenses, and for that reason, denies the allegations of paragraphs XI and XII and particularly denies that plaintiff has been damaged in the sum of \$323,500, or in any other sum, as the result of any negligence or breach of duty on the part of defendant.

For Further Answer and by Way of a First Affirmative Defense, defendant alleges that if the

complicated manner allegedly adopted by plaintiff in attempting to reach the roof of the school building in question created a dangerous situation and a grave and serious menace and peril to the life and safety of plaintiff as alleged in his complaint, plaintiff, himself, in adopting such method of attempting to reach the building roof failed to exercise reasonable care for his own safety and was himself guilty of negligence materially contributing to cause the injuries complained of.

For Further Answer and by Way of a Second Affirmative Defense, defendant alleges that if there were anything dangerous attendant upon the method adopted by plaintiff in attempting to reach the roof of the school building in question, such dangers were open and obvious to anyone exercising reasonable care for his own safety, and in adopting such method of reaching the roof, the plaintiff assumed all risk of injury attendant upon the use of such method.

Wherefore, having fully answered, defendant prays that the complaint of plaintiff be dismissed and that defendant be awarded its costs and disbursements.

HAWKINS & MILLER,

/s/ JOHN D. MacGILLIVRAY,

Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 16, 1954.

[Title of District Court and Cause.]

NOTICE

To: Frank Funkhouser—1329 Old National Bank
Bldg., Spokane, Wash.

Therrett Towles—1231 Old National Bank
Bldg., Spokane, Wash.

James Towles—107 Sydney Bldg., Kellogg,
Idaho.

Hawkins & Miller—Coeur d'Alene, Idaho.

John D. MacGillivray—711 Old National Bank
Bldg., Spokane, Wash.

Take Notice that the above-entitled case has been
reset for jury trial in said Court at 10 o'clock a.m.,
on Wed., Oct. 20, 1954, at Coeur d'Alene, Idaho.

Date: Oct. 12, 1954.

ED. M. BRYAN.

In the District Court of the United States for the
District of Idaho, Northern Division
No. 1986

G. A. PEHRSON,

Plaintiff,

vs.

C. B. LAUCH CONSTRUCTION CO., a Corpora-
tion,

Defendant.

JUDGMENT

This cause came on for trial before the Court and
jury, both parties appearing by counsel, and the
issues having been duly tried and the jury having
rendered a verdict for the defendant.

Wherefore, By virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged that the plaintiff take nothing upon his complaint herein, and that the defendant have and recover from the plaintiff its costs and disbursements incurred herein, taxed in the sum of \$188.32.

Witness the Honorable Chase A. Clark, Judge of said court, and the seal thereof, this 22nd day of October, 1954.

[Seal] ED. M. BRYAN,
Clerk.

By /s/ LONA MANSER,
Deputy.

[Endorsed]: Filed October 22, 1954.

[Title of District Court and Cause.]

BILL OF COSTS

Memorandum of Costs and Disbursements

Witness Fees

Spokane—32 miles

Richard Van Slate—

3 days @ \$4.00 per day	\$ 12.00	
Mileage, 64 miles @ 7c	4.48	\$ 16.48

Alvin Slentz—

3 days @ \$4.00 per day	\$ 12.00	
Mileage, 64 miles @ 7c	4.48	16.48

Harold F. Loveland—

1 day @ \$4.00 per day	\$ 4.00	
Mileage, 64 miles @ 7c	4.48	8.48

Charles E. Brunett—

1 day @ \$4.00 per day	\$ 4.00	
Mileage, 64 miles @ 7c	4.48	8.48

Careywood, Idaho—30 miles

Joe A. Chloupek—

3 days @ \$4.00 per day	\$ 12.00	
Mileage, 60 miles @ 7c	4.20	16.20

Edgar Judy....

3 days @ \$4.00 per day	12.00	
Mileage, 60 miles @ 7c	4.20	16.20

Sandpoint, Idaho—45 miles

Arnold Pichl—

3 days @ \$4.00 per day	\$ 12.00	
Mileage, 90 miles @ 7c	6.30	18.30

Corment Burgman—

3 days @ \$4.00 per day	\$ 12.00	
Mileage, 90 miles @ 7c	6.30	18.30

Boise, Idaho—410 miles

Royal Richardson—

3 days @ \$4.00 per day	\$ 12.00	
Mileage, 820 miles @ 7c	57.40	69.40

Total costs		\$ 188.32
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Costs taxed this 3rd day of November, 1954, in the amount of \$188.32.

/s/ ED. M. BRYAN,
Clerk.

Dated this 25th day of October, 1954.

JOHN D. MacGILLIVRAY;
HAWKINS & MILLER;

By /s/ WM. S. HAWKINS.

Attorneys for Defendant.

Duly verified.

[Endorsed]: Filed October 25, 1954.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

To: John D. MacGillivray and Hawkins & Miller,
Attorneys for Defendant:

Please take notice that the plaintiff, G. A. Pehrson, intends to and does hereby move the Honorable Court in the above-entitled cause to vacate and set aside the verdict of the jury rendered in favor of the defendant and against plaintiff in the above cause, and to grant a new trial of said cause upon the following grounds, to wit:

1. Insufficiency of the evidence to justify the verdict, and that the verdict is against the law.

2. Errors in law occurring at the trial and excepted to by the plaintiff.

Said motion is made upon the records, files and proceedings in said cause.

Dated this 1st day of November, 1954.

/s/ FRANK FUNKHOUSER,

/s/ THERRETT TOWLES,

/s/ JAMES G. TOWLES,

Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 1, 1954.

[Title of District Court and Cause.]

ORDER

This matter is before the court at this time on Plaintiff's Motion for New Trial. The Court has heard oral argument and has fully considered the briefs of respective counsel and the record herein, including affidavits presented on behalf of the plaintiff.

Counsel for both parties have cited the case of *Hooten vs. City of Burley*, 70 Idaho 369, 219 Pac. 2d 651. It is the opinion of this Court that the presumption which arises in a wrongful death action of a prima facie inference that the person killed was, at the time, in exercise of ordinary care and was himself free from contributory negligence, does not arise in a case such as this where the plaintiff is the person injured and his own testimony clearly establishes his contributory negligence.

It is not necessary to consider any particular ruling of the Court during the trial of this matter, because controlling here is the question of contributory negligence. G. A. Pehrson, plaintiff herein, is an architect in Sopot, Washington, and has been in that business for about fifty years. During this time his firm has worked on about 1,600 projects, including 65 schools and ten hotels. The injury complained of herein arose while he was architect for a school building being constructed at Cocalalla, Idaho, for School District Class A, Bonner County, Idaho, and while he was on an inspection tour of

the building in company with a member of the school board. The testimony of the plaintiff is to the effect that Mr. Hirst, the school board member, preceded him, the plaintiff, up the ladder for an inspection of the roof while the plaintiff stood at the bottom with one hand on the ladder. Mr. Pehrson said he felt the ladder move or slip to one side, but immediately thereafter he began to climb up the ladder without taking any precautions to determine whether or not it was setting solidly on the ground or against the building at the top. The plaintiff further testified that he knew there was a risk involved in going up a ladder under such conditions, but that he took that chance, fell and was injured.

It appears to this Court that the plaintiff, by his own testimony, conclusively shows he was guilty of contributory negligence as a matter of law.

For this reason, the Motion for a New Trial is hereby Denied.

Dated this 30th day of August, 1955.

/s/ CHASE A. CLARK,
Chief Judge, United States District Court, District
of Idaho.

[Endorsed]: Filed August 30, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that G. A. Pehrson, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the judgment entered in the above-entitled action on October 22, 1954, and from the Order Denying Plaintiff's Motion for a New Trial, on August 30, 1955.

Dated at Spokane, Washington, this 28th day of September, 1955.

/s/ JAMES G. TOWLES,
/s/ FRANK FUNKHOUSER,
Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 28, 1955.

United States Court of Appeals
for the Ninth Circuit
No. 1986

G. A. PEHRSON,

Appellant,

vs.

C. B. LAUCH CONSTRUCTION CO., a Corpora-
tion,

Appellee.

APPELLANT'S STATEMENTS OF POINTS

Comes now the Appellant, and hereby states that he intends to rely upon the following points of appeal:

1. The trial court erred in denying a motion for a new trial.

2. The trial court erred in not allowing plaintiff's witness Donald Hirst to testify.

3. The trial court erred in striking from the complaint allegations of negligence, alleging that the premises were not kept free of waste material and rubbish. (143)

4. The trial court erred in refusing to admit in evidence that portion of Exhibit 11, subheading Disposal of Waste Material, (page 12) and Portable Ladders (pages 41 and 42) of said exhibit.

5. The trial court erred in not giving plaintiff's requested instructions Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11. (231)

6. The trial court erred in entering judgment for the defendant.

7. The trial court erred in the admission of certain testimony and the refusal to admit certain exhibits, especially Exhibit 11.

Dated at Spokane, Washington, this 28th day of September, 1955.

/s/ JAMES G. TOWLES,

/s/ FRANK FUNKHOUSER,

Attorneys for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 28, 1955.

In the United States District Court for the District
of Idaho, Northern Division

No. 1986

G. A. PEHRSON,

Plaintiff,

vs.

C. B. LAUCH CONSTRUCTION CO., a Corpora-
tion,

Defendant.

TRANSCRIPT

Honorable Chase A. Clark, sitting with a jury.

Appearances :

FRANK FUNKHOUSER, ESQ.,

THERRETT TOWLES, ESQ.,

JAMES G. TOWLES, ESQ.,

Attorneys for the Plaintiff.

JOHN D. MacGILLIVRAY, ESQ.,

HAWKINS AND MILLER,

Attorneys for the Defendant.

October 20, 1954, 10:00 A.M.

(Selection of Jury.)

The Court: You may call your first witness.

Mr. Towles: I would like to inquire are any of
the executive officers of the defendant company in
the courtroom?

Mr. MacGillivray: No, they are not.

Mr. Towles: The president is not here?

Mr. MacGillivray: He is not.

Mr. Towles: Nor the vice-president nor the secretary-treasurer?

Mr. MacGillivray: No, they are not.

Mr. Towles: And where do they reside?

Mr. MacGillivray: They reside in Boise, Idaho.
Mr. Lauch may be here tomorrow, I do not know.

The Court: I think I will take a short recess before we have the opening statement.

(Admonition to the Jury.) [1*]

The Court: Gentlemen, before we recess may I have a stipulation that it will not be necessary to give this admonition before each recess or adjournment of the Court?

Mr. Towles: The Plaintiff will so stipulate.

Mr. MacGillivray: Again, that may be stipulated.

October 20, 1954, 11:05 A.M.

(Opening statement by Mr. Towles.)

G. A. PEHRSON

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Towles:

Q. Mr. Pehrson, are you the plaintiff in this case?
A. I am.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of G. A. Pehrson.)

Q. Where do you live? A. Spokane.

Q. And what is your address?

A. 719 East Twenty-fourth.

Q. How long have you lived in Spokane?

A. Since 1906.

Q. What is your business, Mr. Pehrson?

A. I am an architect. [2]

Q. How long have you been in that business?

A. About fifty years.

Q. In that business do you maintain an office in Spokane? A. Yes, sir.

Q. And where is that?

A. In the Old National Bank Building.

Q. What was your age at the time of the accident? A. Sixty-eight.

Q. What is your build, will you describe it for the record, please?

A. My height is five foot eight and one-half inches. I weight one hundred sixty-five pounds.

Q. Are you stocky?

A. I am not stocky. I am about standard as you probably can see.

Q. Are you married? A. Yes.

Q. Do you have children? A. Yes.

Q. Are you fitted to anything other than the profession of an architect?

A. No, that is my profession.

Q. Can you tell us, just as briefly as you can, about some of the buildings that you have been architect for?

(Testimony of G. A. Pehrson.)

A. I came out to this country for the Davenport Hotel and I was in charge of that construction. I have designed [2-A] the Paulsen Medical and Dental Building in Spokane and the Chronicle Newspaper Building in Spokane. I have designed the Florence Hotel in Missoula and the Leland Parker Hotel in Minot, North Dakota, and I have done several buildings in California, five houses and three store buildings. We were architects on the Hanford Project and designed that. I was on that from 1943 to 1945. We have designed about sixty-five schools, among the later ones is the Sandpoint High School and these schools in Bonner County. At the present time we are building a hospital in Bonners Ferry. We have designed things like the Centennial Flouring Mills in Spokane, you probably know about that building, and we have designed about one hundred sixty houses, running from twenty-five thousand dollars to one hundred fifty thousand dollars. Our projects in the fifty years that I have been practicing are about sixteen hundred, so you can see I cannot repeat all of them. We have been fortunate enough to have a good business.

Q. How many schools have you designed, Mr. Pehrson? A. Sixty-five.

Q. And how many hotels? A. Ten.

Q. Are you acquainted with School District Class A, No. 82, Bonner County, Idaho? [3]

A. Yes, sir, that is at Sandpoint.

Q. And do you know its officers?

A. Yes, sir.

(Testimony of G. A. Pehrson.)

Q. And did they engage your services as an architect for the construction of several school buildings in November of 1951? A. Yes, sir.

Q. And now this particular school building at Cocolalla, Idaho, did you prepare the plans and the specifications for that building? A. Yes, sir.

Q. What kind of a building is it, just tell the jury.

A. It is a one-story building with a multi-purpose room. It is a six schoolroom building with a multi-purpose room constructed of concrete foundation, walls, and brick walls, wood joists, plank roof with composition roofing.

Q. I am handing you Plaintiff's Exhibit Number One and Plaintiff's Exhibit Number Two marked for identification, and I will ask you to state what they are.

A. Exhibit Number One is the specifications—the specifications for the general work and for the plumbing, the heating and the electric wiring for the school building for Cocolalla, Idaho.

Q. Does that contract contain a condition of the contract as a part of the contract? [4]

A. The contract is not in here.

Q. This is the contract (indicating)?

A. This is part of the contract—this is the contract here, the first four pages is the formal contract and the rest of it is the specifications. Exhibit Number Two is the drawings of the general construction, it is all the drawings required to construct the building by.

(Testimony of G. A. Pehrson.)

Mr. Towles: I wish to offer the contract in evidence and to substitute a copy in its place. The contract is admitted in the pleadings.

Mr. MacGillivray: We object to the admission of Exhibit Number One being the contract and the contracting conditions as between Bonner County School District Number 82 and the Lauch Construction Company on the basis and grounds that it is immaterial; it is a contract between the two parties and Mr. Pehrson is not a party to the contract. That contract is wholly immaterial here. This raises a question of law that there will probably be quite a bit of discussion on.

The Court: I will reserve my decision on the admission of that Exhibit. The Court has not ruled on the admission yet. If the Court does permit you to put that in evidence then, [5] of course, you will be permitted to substitute a copy but there is no necessity of doing that at this time.

Mr. Towles: May I read the pertinent provisions of this?

The Court: Not at this time, not until I rule on it.

Q. What was your duty in connection with the construction of this building?

A. My duty as an architect consisted of preparing the plans and the specifications, assisting the owners in taking bids and letting the contract. After the contract is awarded the architect's duty is to check the construction to see that the contract was complied with and that the owner got what was

(Testimony of G. A. Pehrson.)

contracted and that the contractor was not asked to do anything beyond what the contract called for. I was an arbitrator besides being the agent of the owner. My duty was to supervise the construction and continuously check to see that the contract was complied with on both sides.

Q. Now then, can you tell us on September 12, 1952, what was the condition of the school building?

A. Up to that time the building was about fifty per cent completed. The roof planking was on, the walls were up and the construction company was working on the interior partitions and such things.

Q. What happened on September 12, 1952, with regard to [6] your inspection of the construction of this building?

A. I periodically was on the job and on September 12th I started out. We had four or five jobs going on at that time for Bonner County and the first one was at Cocolalla. I stopped at Cocolalla to check that job and before going any further I called at the Cocolalla store, the store was operated by one of the school trustees and I reported that I was on the job to check—Mr. Hurst was the school trustee and Mr. Hurst said “I will go with you to the building, there is something I want to talk to you about.” and so together we started on to the school, this was about 11:30 on September 12th and we got to the school and looked over a few things inside as to the framing and how it was nailed and spiked and fitted and Mr. Hurst said——

(Testimony of G. A. Pehrson.)

Mr. MacGillivray: We object to that as hearsay, that is, any conversation with Mr. Hurst.

The Court: The objection is sustained as to any conversation with him, you may just proceed.

Q. Just what you did, not any conversation that you had with anybody.

A. Mr. Hurst and I—your Honor, if I can answer that I [7] don't know, Mr. Hurst instructed me to do certain things.

The Court: Anything that he told you in the absence of the defendant or any officers of the defendant company or any of its agents would not be admissible, just what you did.

A. Well, what we did, after we got through on the first floor Mr. Hurst started up the ladder to the roof. When he got up there off the ladder—it was a ladder standing on the west side of the school building next to a concrete ledge over the main entrance, and the ladder was sixteen feet long and reached to that ledge. Mr. Hurst climbed up and got off the ladder on the ledge. After he got on the ledge he went over the parapet wall on the roof, it was about three feet and eight inches above the ledge and he went over the parapet and I started up, I got to the top of the ladder and began to transfer my body from the ladder to the ledge and to perform that action—am I to explain that?

The Court: Just what you did, yes.

A. In order to get to the roof, so far as I was concerned, the only method I could use was to climb to the top of the ladder, when I got to the second

(Testimony of G. A. Pehrson.)

rung from the top [8] I took hold with my left hand on the parapet wall, which was three feet and eight inches above the ledge, to steady myself because it is hard to balance on a ladder when you get to the top and that is the method that I used. After I got hold of the parapet wall with my left hand I moved my right knee over on the concrete ledge and began to get the balance of my body over on the right knee and to get my balance off the ladder, and in so doing, which I have done several times before, but at that time, as I was doing that, the ladder began to move to the left and I didn't have sufficient weight of my body on the ledge and so in striving to get my body over on the ledge, that is to get the weight of my body over on the ledge, I began to kick harder on the ladder with my left foot and the ladder was so short that I was at the top of the ladder and I began to feel that the ladder moved to the left and kept on moving slowly and there was nothing that I could do except striving all that I could to get my balance over and I began to feel that my grip up on the parapet wall with my fingertips began to slip and as it slipped and as the ladder moved further I felt my fingertips slipping off and I knew there was nothing to do but to fall to the ground. I fell, and I remember nothing beyond that after I hit the ground. I knew that I was falling through the air, I knew that [9] I was going to fall, and after I hit the ground I lost my consciousness and from that time on I knew nothing further.

Q. Mr. Pehrson, did you make some drawings

(Testimony of G. A. Pehrson.)

here so that you could have a model made of the condition there? A. Yes, I did.

Q. I am now handing you Plaintiff's Exhibits Numbers Three and Four, and I will ask you to state what those drawings are and the purpose of them.

A. I made them for the purpose of preparing a model so that the jury could see what the building looked like. It is hard for people that are not used to drawings to interpret a drawing, and so I made this up and had the modeler make a wood model of the front of the building and the concrete ledge.

Q. Did you have this model made from the drawing which you had made?

A. From the drawings I had made and also from Exhibit Number Two, yes, it is also from these drawings.

Q. From drawings that are Exhibits Three and Four? A. Yes, Three and Four.

Q. And you had this model made?

A. Yes, sir.

Q. Did you supervise the making of this model?

A. Yes, sir.

Q. Does it correctly depict the conditions as they were [10] at the time of the accident in question?

A. Yes, sir.

Q. And on what scale is that made?

A. One-half inch to the foot so that this portion (indicating) of the building was twenty times as big as that model is.

Q. Mr. Pehrson, will you put on this model where

(Testimony of G. A. Pehrson.)

that ladder was located, just indicate, or put this model in place.

A. This represents the ledge, this is the level of the land at the time of the accident, this ladder, the ladder that was used stood up like that (indicating). This is the position of the ladder approximately, but the ladder was never in the same position very long, it was light and sometimes it was over here, sometimes maybe over here, it was never exactly in the same position. At the time of the accident this is approximately where it was standing. As I began to climb off on this ledge I had my left foot on this rung of the ladder and as I began to climb off—here is the parapet wall, and I hung onto that with my left hand as I began to get my knee over on this ledge, the ladder began to slide this way.

Q. Now you have been describing this from Plaintiff's Exhibit Number Five?

A. Yes. [11]

Mr. Towles: I wish to offer in evidence at this time Plaintiff's Exhibits Numbers Three and Four marked for identification, the drawings and this model marked as Plaintiff's Exhibit Number Five.

Mr. MacGillivray: In order to save time, Mr. Hawkins and I have not seen these exhibits and after the recess this evening I wonder if we could check Exhibits Three and Four as to just what they are and what they contain?

The Court: Yes, you may do that.

Mr. MacGillivray: And as to Number Five I wonder if I may ask a question or two on voir dire.

(Testimony of G. A. Pehrson.)

The Court: Yes, you may do that.

Q. (By Mr. MacGillivray): Mr. Pehrson, can you tell us—on the building itself as constructed according to your plans and specifications, the height of the bottom of the overhanging ledge from the top of the concrete foundation.

A. It is to the top of it twelve feet from the top of the concrete foundation, but it is fifteen feet and four inches from the grade at the time of the accident.

Q. And there is brickwork from the foundation to the [12] bottom of the ledge? A. Yes.

Q. And what is the height of that brickwork?

A. Eleven feet and seven inches.

Q. Eleven feet seven inches? A. Yes.

Q. The ledge itself is what width?

A. Six inches.

Q. And the concrete wall above the ledge is what height?

A. From the top of the ledge it would be three feet and two inches.

Q. From the top of the brickwork to the top of the parapet wall would be three foot eight?

A. Three feet and eight inches, yes.

Q. And the ledge is of concrete construction?

A. Yes.

Q. And it extends out from the parapet wall for a distance of what? A. Two foot ten.

Q. And the ledge is of what length?

A. It is approximately twelve feet eight inches from this high wall here (indicating).

(Testimony of G. A. Pehrson.)

Q. In other words, from the left side of the ledge looking toward the building, over to the right side against this wall (indicating)? [13]

A. That is approximately twelve feet six inches, I would say.

Q. Now, the ladder that you have made a scale of, you say is a sixteen foot ladder?

A. Yes, sir, that is one-half inch to the foot.

Q. Had you ever measured the ladder that you used?

A. No, but I knew that it reached to that point on the ledge, that is the only thing I could say, I had not measured the ladder.

Q. Then the ladder is possibly not an exact replica of the ladder in question?

A. No, not outside of as I have said.

Q. In other words, the ladder would reach down below or up above the ledge in accordance with the pitch of the ladder?

A. Yes.

Q. Do you know how many rungs there were on the ladder?

A. The standard is fourteen inches from edge to edge, that is what the builders use, but they do vary.

Q. And was this a standard ladder that builders use?

A. Yes, it was made with two-by-four uprights and one-by-three rungs.

Q. And it was the standard that you see all builders use?

A. No, not exactly, as I recall the rungs were on

(Testimony of G. A. Pehrson.)

the outside of the uprights and usually the builders use a filler in between the rungs for the standards they have [14] between the rungs on the two-by-fours they have one-by-twos to make the standards out flush with the rungs.

Q. You have seen standard ladders constructed like this one? A. Yes.

Q. And used on many construction projects?

A. Yes, sir.

Q. Now, Mr. Pehrson, turning this exhibit around here, you show in the back the top of the parapet wall here (indicating) is this to demonstrate the roof itself, right here (indicating)?

A. That is approximately. I might explain that the roof slopes and it might not always be that, it might not always be in that position. It happened that at the point of entrance it was a little over fourteen inches from the top of the parapet wall to the roof.

Q. On the Exhibit you have the roof down three feet and two inches from the parapet wall?

A. I didn't give the modeler any instructions. It varies and never is the same.

Q. So that the jury may understand, when you reached your leg over the parapet wall, which was three feet and two inches, you then put your foot upon the roof just fourteen inches below the top of the wall? A. That's right. [15]

Q. And the top of the roof continues the same way around the building?

(Testimony of G. A. Pehrson.)

A. No, not the same, it varies, but the minimum was fourteen inches.

Q. It was fourteen inches at this point?

A. Yes.

Q. Now, Mr. Pehrson, the ground that you have out here, that is not intended to duplicate the actual ground condition as it existed that day?

A. No.

Q. The ground that you have with the fall off here, and the ground not extending to the foundation, that is not intended to duplicate the conditions as they were on September 12th?

A. Yes, I will have to explain that.

Q. All of the depressions on the ground shown on this exhibit, you know that those were present on that date?

A. Yes, that ground level was approximately three feet below the first floor level at that time or when the job was started as that Exhibits Number Two and Number Three will show, and that grade of the basement was 94. Figuring from the first floor and establishing the first floor as 100 the natural ground elevation was 94.41 or approximately five feet and four inches below the first floor. During the process of excavation [16] it shows a part of it, as it shows on Exhibit Two, a part of the side was cut and a part of it had to be filled. During the process of the excavation for crawl tunnels and so forth, the dirt was piled in front of the building. At the time of the accident as far as my record shows, and we keep a fairly complete record, that

(Testimony of G. A. Pehrson.)

was the elevation. The elevation of the ground at that time was 97 or three feet below the first floor.

Q. What I have reference to, Mr. Pehrson, was out about fifteen or twenty feet you have various depressions in the ground here at this point, now that is not supposed to be an exact replica of this depression or that depression?

A. No, that is right, that is just approximate.

Q. Did you make this model, Mr. Pehrson, or did you prepare these drawings?

A. I prepared the drawings, I didn't have time to make the model, I had a man by the name of Donald Pond make it.

Q. Were the models or drawings taken from the original drawings of the job itself?

A. Of the building, yes, sir.

Q. And what about the ground?

A. The ground at that time, I think I stated, Mr. MacGillivray, that my notes shows that at that time the [17] ground level was 97. That is what we tried to establish that elevation at, in that area, maybe a few inches one way or another.

Q. In the course of construction of a building such as this, the excavation, and the backfill being done, causes the ground level to change from time to time? A. That is correct.

Mr. MacGillivray: We have no objection to the exhibit.

The Court: Then it may be admitted. And does that apply to number three and number four?

Mr. MacGillivray: We would like, if we may,

(Testimony of G. A. Pehrson.)

your Honor, to look at numbers three and four later on, if you will withhold ruling.

The Court: Yes, ruling will be reserved and you may look at them. This is number five, the model, and it may be admitted at this time.

Q. (By Mr. Towles): I believe, Mr. Pehrson, you stated that you kept notes and records of the grade elevation around that school building?

A. Yes.

Q. Handing you Exhibit marked Plaintiff's Exhibit Number Six for identification, will you state what those notes represent on that paper? [18]

A. They represent the field survey.

Q. The field survey?

A. Yes, sir, of the ground before the work was started. In order to design the footings and the amount of concrete and other material required and the depth of the footings, it is necessary to get a survey to establish the contours of the ground, so that we can determine how deep the footings are to go and those are the field notes or the notes that were taken when the survey of the contours were taken.

Mr. Towles: I offer Exhibit Number Six in evidence at this time, from that the drawings, Exhibits Exhibits Number Two and Three were prepared.

Mr. MacGillivray: May I ask a question?

The Court: Yes, you may.

Q. (By Mr. MacGillivray): Mr. Pehrson, these are the field notes of whom?

A. Myself and another man.

(Testimony of G. A. Pehrson.)

Q. They were prepared when?

A. That was shortly after our contract was signed, probably that was in March of 1952—if I may see that other exhibit—yes, it was somewhere about the middle of March, 1952. [19]

Q. March of 1952? A. Yes.

Q. This is all just hieroglyphics to me but that portrays the ground level as of the middle of March, is that right? A. That is right.

Q. And it does not portray the ground level as it continued, as the construction continued to September of 1952?

A. You can see some figures there—I would have to interpret that, there are some figures on that Exhibit, if you will look at it, I think I can explain it. These elevations, the grade elevations, on these drawings, were established from that field drawing in order to determine the footings, as I said before, we had to get the condition of the ground before any work was done on it, and that is represented on that.

Q. But still it doesn't represent any ground level after construction was started?

A. No—yes, some of them do, some of the figures the black figures represent the way it was before any work was done. The figure 94.42 represents before any work was done and the other figure 98 is supposed to represent what we intended it to be when the job was finished. In other words, the black figures are the way it was before we started and the

(Testimony of G. A. Pehrson.)

red ones are the [20] way we intended it to be after it was completed.

Mr. MacGillivray: I think it is immaterial, your Honor, Mr. Pehrson has testified now that the ground level changed and did change.

The Court: I will say this, it is all Greek to me.

Mr. MacGillivray: Yes, and I think it is worse than Greek to the jury.

The Court: I understand that Exhibits Number Three and Four have everything on them that is on this exhibit. Is that right, Mr. Pehrson?

A. You say three and four?

The Court: I understand they have everything on that the exhibit we are talking about now has.

A. I believe that all of the things that are before you now have reference to each other.

The Court: But I understood you to say that Exhibits Three and Four were drawings that you had made from that Exhibit.

A. Exhibits Number Three and Four are drawings made from the figures.

The Court: I thought that was the way you had explained it.

A. That is right. [21]

The Court: Yes, now we understand it. I thought that all of it was embraced in Exhibits Three and Four.

A. That is right.

The Court: Then it is not necessary to admit this exhibit. If Three and Four are admitted you have all of this in the record.

(Testimony of G. A. Pehrson.)

Mr. Towles: May I ask a question at this point?

The Court: Yes, you may.

Q. (By Mr. Towles): What distance did you fall from the top of that ledge to the ground?

A. Fifteen feet and four inches.

The Court: There are two matters before the court now, one is the admission or rather the question of admission of Exhibits Three and Four. No objection was made to these exhibits as yet, but I understand that counsel wants to look at them before ruling is made, and the other is concerning this one that he now has in his hand and the Court will reserve ruling on that until you have had time to look at the other exhibits. Then, there is also the objection to the admission of the contract. I don't believe inasmuch as this plaintiff not being a party to the contract, Exhibit Number One, I don't think it is admissible, and the objection to Exhibit Number One will [22] be sustained.

Mr. Towles: Your Honor, the contract was admitted in the pleadings and this plaintiff is the agent of the school district and has so testified.

The Court: If it is admitted then it doesn't need to be introduced in evidence. I don't know how it can help the situation any. This plaintiff is not a party to the contract, he is not obligated in any way under this contract.

Mr. Towles: He is obligated to make prompt inspection of the work.

The Court: But that is a matter between him and the school board.

(Testimony of G. A. Pehrson.)

Mr. Towles: But, your Honor, it is a part of the contract.

The Court: Well, if they have admitted it in the pleadings, you certainly have nothing to worry about, but so far as the ruling of the Court is concerned, the Court does not think it is material.

Mr. MacGillivray: We admitted the execution of the contract on March 31st, I believe it was, and we admitted that we had entered into the premises and were in charge of the premises at the time the accident happened. [23]

The Court: I think that is all that would be necessary, the terms and conditions of the contract would not be material in here, they have admitted that he was inspecting that school building which the school board were having built. You may look at these exhibits during the recess of the Court.

Mr. MacGillivray: Thank you, your Honor.

DR. J. P. MONSON

called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. James G. Towles:

Q. Doctor, will you state where you are practicing at the present time?

A. At Sandpoint, Idaho.

Q. And who are you associated with?

A. The North Idaho Clinic.

(Testimony of J. P. Monson.)

Q. Approximately how long have you practiced in Sandpoint?

Mr. MacGillivray: We will admit the qualifications of the doctor, I think perhaps that will save some time.

The Court: Yes, it will save considerable time. You may proceed, the qualifications are admitted.

Q. Do you recall the events of September 12, 1952, which [24] happened in regard to Mr. Pehrson? A. Yes.

Q. And will you state what you recall happened on that day?

A. I was called shortly after noon to treat an emergency in the hospital, I was working in the clinic at that time and when I arrived at the hospital Mr. Pehrson was there on a stretcher in the emergency room.

Q. What was his condition at that time?

A. He was semi-conscious, he was not clear but he would respond when spoken to.

Q. Was he in a state of shock at that time?

A. In mild shock, yes, sir.

Q. At the time he was there, did you take any X-ray pictures of his body? A. Yes, we did.

Q. Are those the pictures that you have in your hand? A. Yes.

Q. Handing you Exhibit Number Seven, will you state what it is?

A. Exhibit Number Seven is an X-ray of the pelvis and the hip bone and the upper femur is ac-

(Testimony of J. P. Monson.)

tually there, also. It is actually a flat plate of the pelvis and hips.

Q. Is that of Mr. Pehrson?

A. Yes, it is. [25]

Q. And what does the X-ray show?

A. The X-ray shows a comminuted fracture of the neck of the right femur.

Q. Will you explain in a few words, in layman's language, what that is?

A. It means that the neck or the upper end of the big bone, the femur, has been broken into more than two pieces, that is, the upper leg where it joins the pelvis, and it has been broken, as I say, into more than two pieces in the area—the neck is the area where the bone turns to lodge in the pelvis where it rotates in the pelvis.

Q. Handing you Plaintiff's Exhibit Number Eight, will you state what that is?

A. That is an X-ray of the left shoulder, showing a fracture of the medial aspect or the center of the clavicle, the left clavicle which is the collar bone and runs from the sternum to the shoulder.

Q. Were those pictures taken on September 12, 1952? A. Yes.

Mr. Towles: We offer in evidence Exhibits Number Seven and Eight.

Mr. MacGillivray: We have no objection.

The Court: They may be admitted. [26]

Q. Did you have any conversation with Mr. Pehrson the day that he was in the hospital?

A. Yes.

(Testimony of J. P. Monson.)

Q. Will you state to the best of your recollection what that was?

Mr. MacGillivray: We object to any conversation as hearsay, Dr. Monson didn't treat Mr. Pehrson.

A. I did treat him until we found evidence of the fractures at which time I called Dr. Wendle to come and care for him.

The Court: That is all you wanted to know, wasn't it, Mr. Towles. You will not need any more conversation.

Mr. Towles: No, that is all right.

Q. Did you send Mr. Pehrson to Spokane to any other doctor?

A. I did not, Dr. Wendle did, he took over the case after I had seen the patient.

Mr. Towles: That is all.

Mr. MacGillivray: I have no questions.

The Court: Court will be adjourned at this time until ten o'clock tomorrow morning. [26-A]

October 21, 1954, 10:00 A.M.

The Court: The Jury are all present, gentlemen, you may proceed—first, let me ask you, do you have any objections to Exhibits Three and Four?

Mr. MacGillivray: There is one that we have no objection to, your Honor, I don't recall the number, but it is the colored exhibit. The other we would have an objection to as it is a reconstruction by Mr.

Pehrson upon which there would be some conflict in the evidence.

The Court: Will you look at the exhibits and see which it is that you have objection to?

Judge Hawkins: Our objection goes to Number Three.

The Court: You have no objection to Number Four?

Judge Hawkins: None to Number Four.

The Court: Exhibit Number Four may be admitted. I will take under advisement the question of the admission of Exhibit Number Three.

(Mr. Pehrson recalled to the witness stand.)

G. A. PEHRSON

Direct Examination

(Continued)

By Mr. Therrett Towles: [26-B]

Q. Mr. Pehrson, I am handing you Plaintiff's Exhibit Number Nine, and I will ask you to state what that is.

A. That is our executed contract with the school district to perform the services of an architect.

Mr. Towles: I am offering in evidence Plaintiff's Exhibit Nine at this time. I am especially calling attention to the first paragraph on page one and also to paragraph six on page two.

Mr. MacGillivray: Defendant objects to the admission of Exhibit Number Nine on the basis that it is entirely immaterial, it is a contract between the

(Testimony of G. A. Pehrson.)

school district, School District 82 and the Plaintiff Pehrson to which the defendant is not a party and the defendant is not bound by any terms of this contract.

Mr. Towles: It is for the purpose of showing the authority that Mr. Pehrson had to go on the grounds and to supervise the construction of that building.

Mr. MacGillivray: For that purpose we will stipulate that Mr. Pehrson was the architect for School District Number 82 and that as an architect he had full authority to go on that ground where the school was being constructed. [26-C]

The Court: With that admission the objection to the exhibit will be sustained.

Q. Mr. Pehrson, who directed you to go up the ladder on the day of the accident?

A. Mr. Donald Hurst, trustee for School District Number 82.

Q. For what purpose did you go up the ladder?

A. The purpose was to check some work that he considered was not in accordance with the contract.

Q. But you never got there?

A. I never got there.

Q. I may have touched on this yesterday, but let me ask was this the only means of access to the roof at that time? A. Yes.

Q. Who used this ladder?

A. I used it, the workmen who had any work to do on the roof used it, in fact, anyone that had anything to do with the roof used that ladder.

Q. Had you been up and down this ladder be-

(Testimony of G. A. Pehrson.)

fore? A. Yes, several times.

Q. Had you had any difficulty on those occasions? A. No.

Q. Handing you Plaintiff's Exhibit Number Ten, I will ask you to state what that is? 27]

A. That is a photograph of the entrance to the Cocolalla school in its present condition.

Q. When was that taken?

A. It was taken Monday.

Q. By whom?

A. Ross Hall of Sandpoint, a photographer at Sandpoint.

Q. And were you present at that time?

A. Yes.

Q. You saw him take that picture?

A. Yes.

Mr. MacGillivray: We have no objection if it is offered.

Mr. Towles: We will offer it in evidence.

The Court: It may be admitted.

Q. That shows the conditions as they are at this time? A. That is right.

Q. At the time of the accident the grade was not as it is now? A. No.

Q. The cement walk was not in? A. No.

Q. The doors were not in? A. No.

Q. The window was in, was it? [28]

A. The window was in but not the glass.

Q. In connection with this ladder, Mr. Pehrson, what was the top of the ladder resting against?

A. The top of the ladder was resting against the

(Testimony of G. A. Pehrson.)

concrete wall of the main building of the school building, not against the concrete ledge that you see.

Q. At the time that you went up the ladder, how far was it from the concrete ledge?

A. I would have to say that I am not sure but from memory and observation at the time I would say about six inches away from the ledge—the right standard was about six inches away from the ledge.

Q. Could a ladder have been furnished you and the other workmen on the building that would have reached to the parapet wall of the building?

Mr. MacGillivray: We object to that as calling for a conclusion of the witness.

The Court: The objection will be sustained, it is not a question of what could have been furnished, it is a question of what was furnished.

Q. How long would such a ladder had to have been?

Mr. MacGillivray: We object to how long it would have had to have been.

The Court: Yes, the objection is sustained, the question is only with regard to this ladder. [29]

Q. Was this ladder fastened to the wall or to the ledge in any way? A. No, sir.

Q. Was it in danger of slipping or tipping?

Mr. MacGillivray: We object to that as calling for a conclusion of the witness.

The Court: Yes, that is correct, the jury will decide that question.

Q. It was not fastened?

(Testimony of G. A. Pehrson.)

A. No, it was not fastened.

Q. How about this ladder in its position with reference to the wall of the building and the concrete ledge, was it always in the same position?

A. No.

Q. What did you have to do before you went up the ladder?

Mr. MacGillivray: We object to that as calling for a conclusion.

The Court: It is not a question of what he had to do, but what he did do.

Q. What did you do?

A. Ordinarily you would——

The Court: Not what you would ordinarily, what did you do?

A. At that time I tried to move it in position as nearly as I could.

Mr. Towles: Your Honor [30] I am going to offer in evidence Plaintiff's Exhibit Number Eleven, which is the Idaho Minimum Safety Standard and Practices for the Building and Construction Industry—Code #2, Adopted September 15, 1947, by the Industrial Accident Board of the State of Idaho. In connection with these safety regulations, they were adopted by the Board pursuant to Sec. 72-1101 of the Idaho Code which authorized the Board to adopt reasonable, minimum safety standards, to make inspections in and about any place where workmen are employed. We have had these regulations certified by the Secretary of the Industrial

(Testimony of G. A. Pehrson.)

Accident Board and the authority in connection with these safety standards is——

The Court: Just offer it, Mr. Towles, and see if there is any objection. I am wondering if there is any more reason to put this in evidence than there would be to put the statutes or code of the state in. Isn't it a question of law that the Court takes judicial notice of in instructing the jury? It is just a little unusual to introduce the law in evidence, usually the court takes care of the law. However, if there is no objection, I will admit it, of course.

Judge Hawkins: I do have objection to this. However, I didn't want to rise and tell Mr. Towles until he had finished. [31]

The Court: What is your objection, Judge Hawkins?

Judge Hawkins: I have a number of reasons to object to this, your Honor, first, it is a promulgation of rules and regulations put out by the Industrial Accident Board regulating the conditions of employment between an employer and an employee, a situation which is remote entirely from the obligations that this defendant, the construction company, may have had to an independent architect who was going on the property in behalf of the school district and who was not an employee of the defendant, and upon which he is attempting to impose conditions which are recited by the Industrial Accident Board in an employer-employee relationship. Our position is that the common law applies to this case but not regulations that are

(Testimony of G. A. Pehrson.)

adopted by the Industrial Accident Board, the statute is quite clear on that. It is the working conditions that are here prescribed.

That is the fundamental objection to it. This man is an independent architect who has come in here and he does not hold any employer-employee relation. Likewise, if you are going to rely on official reports they have not complied with Section 9-317 that they plead the report or make it available in advance—it comes as a complete surprise, it has never been [32] pleaded in the pleadings and we have never had a chance to answer or allege the position of the defendant. If any reliance is had on a report of this kind it must be pleaded and made available and a copy supplied to the adverse party a reasonable time before the trial and that has not been done in this instance, but the principal thing is that the purpose of these regulations is to protect the employer-employee relationship and not one in the position Mr. Pehrson finds himself, going in as a licensee to make an inspection of the premises under an independent contract.

Mr. Towles: I think you are mistaken about his being a licensee, he was a business invitee on these premises. He was there because he had a right to be there.

The Court: Don't you agree with me, Mr. Towles, that this is a question of law for the court to determine in giving his instructions to the jury under the evidence here? Is there any more reason to introduce that book than there would be to introduce the statutes that authorize it?

(Testimony of G. A. Pehrson.)

Mr. Towles: I think so, because your Honor has to know what is in this.

The Court: But I am supposed to know that, Mr. Towles. [33]

Mr. Towles: If your Honor can take judicial notice of this——

The Court: ——I have always taken judicial notice of the laws of the State of Idaho or any document which is a part or authorized under the laws of the state of Idaho, I have always taken judicial notice of that and I have always taken care of it in my instructions to the jury. Perhaps this was not covered by the objection made but it seems to me—I have no doubt but what this matter has no more purpose here in this record than if you introduced the sections of the statutes that authorized it.

Mr. Towles: Then I understand your Honor takes judicial notice of this sort of thing?

The Court: Yes, I do.

Mr. Towles: And they become a part of the law.

The Court: That is the way I understand it. Does counsel have any objection to that ruling of the court?

Judge Hawkins: I have this objection, that the book is promulgated for an entirely different purpose.

The Court: I understand [34] that, but isn't that a matter for me to consider after the evidence is in and in preparing the instructions to this jury?

Judge Hawkins: Without the benefit of that

(Testimony of G. A. Pehrson.)

pamphlet, that is true and of course, it wasn't in the pleadings either.

Mr. Towles: It wasn't necessary to plead the law in the pleadings.

The Court: In order to hurry this matter along, I will take it under advisement, but my present thought is that I will not admit this book, but if I do decide to allow it in evidence I will rule on that later.

Mr. Towles: We have alleged in this complaint that ladder was not securely fastened and we have alleged other general grounds of negligence.

The Court: I will look over the pleadings and I will rule on it later. You may leave it with the clerk so that I may get it. I want to caution the jury again, Ladies and Gentlemen, you understand that these arguments, or what appears to be arguments between court and counsel, are no part of this trial and you will not pay any attention to them at all, you will not consider them as being any evidence in any manner and you are not to be influenced [35] by what has been said here. This is a part of the trial that the court takes care of and you will disregard any statement made by either the court or counsel for either party during these arguments.

Q. Was it any part of your duty to look after these appliances that were furnished you to use to get on the roof or any place else on the premises?

A. No.

(Testimony of G. A. Pehrson.)

Mr. MacGillivray: I object to that and move the answer be stricken as it is a conclusion.

The Court: The answer may be stricken and the jury are instructed to disregard it.

Q. Mr. Pehrson, where is Mr. Donald Hurst?

A. He is in Phoenix, Arizona.

Q. Do you know when he left here?

A. He left here on Friday the 8th of October.

Q. And you cannot bring him here?

A. I can't bring him here.

Q. Now, Mr. Pehrson, we have reached the point where you fell on the ground and were knocked unconscious. I will ask you what happened to you if you know. How long were you left on the ground before you were taken to Sandpoint?

A. When I came to I began to get my body in shape—I tried to see if I was hurt and I found that I couldn't move [36] my right leg, then I tried to raise myself—I was lying a little bit on the right side with my right leg under me. I tried to raise myself and I found that my left arm was very painful, so I didn't do any more but tried to adjust myself and just about at that time some of the workmen came off for lunch—it was just noon and some of the workmen stopped and looked at me and I said "Will you pull me off this pile of rubbish, and lay me on a flat piece of ground so that I can recover." Some of them did, I cannot identify them because I was still about half dead. They pulled me off and laid me on the ground and by that time Mr. Hurst came off from the roof and I asked him

(Testimony of G. A. Pehrson.)

to go to the store which was about a block and a half away and call Doctor Wendle at Sandpoint to send an ambulance for me. I felt that it was not very serious and that he could perhaps fix me up quickly. Mr. Hurst did that and I laid waiting for the ambulance and it took between a half and three-quarters of the hour. By the time the ambulance got back my leg began to ache and it was very sore, it was not useable. I had no power in my right leg. The ambulance came and the driver and one attendant lifted me up and put me in the ambulance and then they drove off to Sandpoint and took me to the hospital. Doctor Wendle and Doctor Monson were both there waiting for me so I explained to them as good as [37] I could—I was still not myself quite—I explained what had happened. I remember distinctly that I asked them not to give this any publicity because I didn't want anyone to know that I was falling off the roofs or something like that, and he said that is hard to keep a secret like that here in Sandpoint. He said "We will take an X-ray and see what shape you are in." That is all I can remember. I was under the impression that I was on a stretcher in the ambulance entrance outside and not in the hospital, that is where the ambulance driver left me, but I don't know, I have been trying to think about the manner in which they took the X-rays. I thought that they had a portable machine out where I was lying but I found afterwards that it wasn't so. At that time I was unconscious but I would come to for a few minutes

(Testimony of G. A. Pehrson.)

—anyway, I don't know how they took the X-ray but Dr. Monson and Dr. Wendle told me that they took me to the X-ray room and took the X-ray and then put me back in the ambulance entrance again. I would say that I was not in the hospital except maybe when I was unconscious and have no memory about that. I came to slightly and Dr. Monson leaned over me and said "Pehrson, you are badly hurt, you are going to take a long vacation." Dr. Wendle came out with the X-ray and said, "You are badly hurt and we cannot do anything for you [38] here because we haven't the facilities. You will have to go to Spokane," and he said "If you will let me know what hospital you want to go to and what doctor you want, I will make the arrangements." I asked him to call the Sacred Heart Hospital and I asked him to make arrangements to get Dr. Adams because Dr. Adams had set four or five broken legs and arms for me before so I wanted Dr. Adams and he called Spokane and he also called my office and my office called Mrs. Pehrson—she happened to be at home and she started for Sandpoint immediately together with one of the men in the office. They arrived in Sandpoint before the ambulance but the ambulance came about two and a half or three hours after the X-ray was taken and I was still lying on the stretcher outside. The doctor had splinted me with pillow splints and tied my right leg up with ropes and tied my shoulder tight with pillows and ropes

(Testimony of G. A. Pehrson.)

and I was lying in that position when the ambulance arrived. The ambulance had arrived at that time and so they moved me into the ambulance, the driver and the ambulance attendant took the stretcher out from the ambulance and set it alongside the stretcher I was on and moved me over on that stretcher and moved me into the ambulance. The nurse came out about that time and before the doctor left he left instructions with the nurse to see that I was sent in as comfortable as possible. She came out and [39] gave me a hypo and said "I am going to make this good enough so that you will probably be comfortable all the way in to Spokane." We started out and during the trip I came to occasionally, just enough to see where I was at, that I was in the ambulance, and I dozed off again and I was unconscious when I got to the Sacred Heart Hospital. I got there approximately I guess about seven o'clock, I don't know but it was close to seven o'clock—I know that it was dark. Sister Amelia was down at the place with two other sisters—the registration sister was there, and they took me upstairs and put me to bed and at that time Doctor Brink came, Dr. Adams was out of the city, and so Doctor Brink came to the hospital. They had put me to bed in a room with two beds, a very small room and Dr. Brink said "This will not do, you will have to have a bigger room." He said "I will have to work on him and I will have a lot of paraphernalia in the room" or something to that effect. They

(Testimony of G. A. Pehrson.)

moved me to another room that had a bed for orthopedic work in it.

Q. What do you mean by orthopedic?

A. Bone work, it had bars across it and things so that you could try to work yourself on. They had, at that time, delivered the photograph or X-ray to the doctor and the doctor looked at it—their X-rays were taken [40] at Sandpoint and they took them on the ambulance while they were still wet, there were two of them and I think they are in as exhibits now. Dr. Brink looked them over and then he turned to me and he said “I don’t believe that we can fix it, the bone is shattered too badly.” and from the looks of the X-rays there is no way that we can fix it, the bone is shattered oo badly.” That made me feel kind of discouraged, and he said “We will take some more X-rays tomorrow, we will see what it looks like then and if it can be done we will decide what to do tomorrow.” By that time he looked at the bed I was lying in a regular hospital bed then, one that they crank up in the middle and he said “This will not do, Pehrson will have to have a straight bed.” And so I had to go through another operation of putting straight boards under me and that was terrible. I said to the nurse “If you are going to kill me, do it fast”——

Mr. MacGillivray: I don’t like to break into the examination, but if Mr. Pehrson will just leave out all the conversations with the doctors and the nurses and tell what was done——

(Testimony of G. A. Pehrson.)

The Court: Yes, we will get along if you will do that, Mr. Pehrson.

A. They changed my bed, they moved me and put some boards on my bed and made a straight bed for me to lie on. [41] After that was done, the doctor left and he said "I will be here in the morning," and he said "I have left instructions to get more X-rays." That was about all. My wife stayed right there, she stayed there with me until about nine o'clock and then she went home and I was alone and I was under terrible pains. It is impossible to imagine the pain. The only way anyone can find out the pains that I had to go through and the pains that I have had to live with and that I lived with for two months after that, the only way you can find that out is to break your hip. I never believed that there was anything so tortuous before this happened, it was terrible. Anyway, the sisters came in and asked me if there was anything that they could do for me and said that they would like to give me a hypo and I refused to take one and I said that I would rather try to get on without it if I could, and they gave me some fruit juice—I hadn't had anything since my breakfast. They gave me some fruit juice and something else, soup or something, but nothing that was poisonous—I didn't sleep that night but the hospital nurses were very kind. They came in every few minutes to look at me to see what kind of shape I was in. Previous to that, they had taken by blood count and also my heart beats and all of that, all through the regular hospital operations.

(Testimony of G. A. Pehrson.)

Anyway, the night [42] passed and the next morning Dr. Brink came in and the nurse tried to give me a bath but she gave that up because it was too painful. Then Doctor Brink came in with his nurse, his nurse from his own office, and he said "What we are going to do now is we are going to get your leg in position so that we can take an X-ray and see if we can do anything for you in this matter." So the nurse and the doctor bored a hole through my leg here and over here and put some stainless steel pins through it and then they rigged a system of pulleys, bolts and weights and tied a fifty-pound weight onto it and put my leg up in the air and that is the way that I was lying for a long time. Then the man came in with a portable X-ray machine and took six X-rays and that was about all that day. But I was still and I couldn't move, I was lying on my back and the nurses tried to make me comfortable with pillows, they have a system of doing that which is remarkable but just the same it was terrible to be there. The following day Dr. Brink came in and said "Judging from these X-rays, I think we can do something for you, it is not as bad as I thought when I saw the X-ray yesterday" and he was rather cheerful and he cheered me up and that is the way that it was left and he said—

How far am I to go, your Honor?

Mr. Towles: Just go ahead and describe it, Mr. Pehrson. [43]

A. He said "We are going to operate," and I

(Testimony of G. A. Pehrson.)

said "Operate, I never heard of anyone operating on bone fractures." And he said "Yes, we are——

The Court: Just leave out the conversation, Mr. Witness, and tell us what was done. Everybody knows that you were hurt, and you just tell us what was done at the time.

A. It is rather difficult not to say what was said.

The Court: Yes, I know it is difficult but you just go ahead and tell what you did and what they did.

A. Then after that I laid there for awhile and I asked if I could think over this operation because I didn't know what operating on the bone meant and so he said "Yes, I have already made arrangements for the surgery for Wednesday morning" and this was Monday and I said "Please cancel it because I would like to talk to Dr. Adams."

Q. Who was Doctor Adams?

A. He is—well, Doctor Adams is Doctor Brink's partner, he is the senior partner and he was the orthopedic doctor for the Shriner's Hospital for many years. He is an old orthopedic man in Spokane and I think everybody knows Doctor Adams.

Q. Will you explain it so that we can have it in the record, where these holes were drilled in your leg? [44]

A. Well, one hole was drilled right down through here (indicating) just above the joint and the other drilled here and the mark is still here.

Q. That is above the knee?

A. Yes, above the knee.

(Testimony of G. A. Pehrson.)

Q. Now then, we have gotten to the point of determining whether to have this operation, was it on the 19th of September that you were operated on? A. Yes, on the 19th.

Q. Now, who had returned to the hospital?

A. Who you say had returned?

Q. Who had returned to the hospital that you wanted to see?

A. No one had returned. Doctor Adams was—I will have to explain, your Honor——

Q. Just go ahead and describe what happened.

A. I was operated on Friday the 19th—two days before this, on the 17th after investigating all that I could about the operation, I said to Doctor Brink “I cannot stand it any longer, go ahead and operate,” and he said “Doctor Adams will be back Friday morning so we will operate Friday morning.”

Q. Did they operate on Friday morning?

A. That is right.

Q. Both of those doctors?

A. Yes, both of the doctors. [45]

Q. Do you know approximately what they did? First, I presume they gave you an anaesthetic?

A. All I know is that on the previous night they began to give me anaesthetic and at nine o'clock to prepare me for operation which means quite a lot of things to do. I couldn't eat anything that night and I was instructed not to eat anything for breakfast. About 7:30 the anaesthetic man came in—I believe three of them came in and gave the final

(Testimony of G. A. Pehrson.)

shot of something and I began to get kind of a little bit weak but at nine o'clock I was still conscious and at nine o'clock they came in and put me on the wagon and wheeled me over to the surgery and from then on I have no memory.

Q. When did you come to from the anaesthetic?

A. I didn't know anything, that is to recognize anything until one o'clock the following morning.

Q. How many hours?

A. That would be about sixteen hours.

Q. Did you recognize either of those doctors during the operation?

A. Just for an instant, I came to and I looked up and opened my eyes and I met the eyes of Doctor Adams and he turned, but he finally gave me—I guess it was some more anaesthetic because I was out again.

Mr. Towles: Your Honor, if we may be permitted to have this witness step down [46] we have another witness here, Mr. Henry George, he is from Spokane and must get back.

The Court: Is he a doctor?

Mr. Towles: No, he is not a doctor, he is a contractor, the contractor on the Coliseum in Spokane, and I think we could get through with him without too much trouble in a very short time.

The Court: Did you have any objection to that?

Judge Hawkins: No, we have no objection.

The Court: Very well, you may proceed. You may step down, Mr. Pehrson.

HENRY GEORGE

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Funkhouser:

Q. Will you state your name to the court and jury? A. My name is Henry George.

Q. Where do you live?

A. I live in Spokane.

Q. How long have you lived in Spokane?

A. A little over forty years. [47]

Q. And what is your occupation?

A. A building contractor.

Q. How long have you been employed in the building business? A. About forty years.

Q. What are some of the buildings that you have constructed in the Inland Empire?

Judge Hawkins: We will admit that he is a building contractor, and a good one.

Q. Will you name some of the buildings?

A. We have built the Fox Theater, the Davenport Hotel, that is, a part of the Davenport Hotel, the Student Union Building in Moscow and the Student Union Building in Pullman and the Library in Pullman—we have built a hundred million dollars worth of buildings in the Inland Empire.

Q. Do you know Mr. Pehrson, Mr. G. A. Pehrson, the plaintiff in this action? A. Yes, I do.

Q. How long have you known Mr. Pehrson?

A. Forty years.

Q. Have you and he ever worked on the same

(Testimony of Henry George.)

building? A. Yes.

Q. And his duties were **what**?

A. He was the architect.

Q. What are the duties of an architect so far as the building is concerned? [48]

A. He plans the buildings, makes all of the drawings, all of the details. He has to inspect the building and see that it is properly constructed. His duties are all fairly written up in the contract.

Q. In making these inspections, that is, in making the rounds is there more or less danger involved for the architect?

Mr. MacGillivray: This is objected to as incompetent, irrelevant and immaterial and calling for a conclusion of the witness. I presume that there are dangers on all construction jobs.

The Court: Yes, that is sustained.

Q. Though there may be some dangers involved is it necessary to make these inspections in any event? A. Yes, sir.

Q. Are you familiar with the rules and regulations adopted by the states, by the respective states where you work, are you more or less familiar with them?

A. We have to be acquainted when we start on a new job.

Q. Have you ever put up any buildings where ladders were used?

A. All of them have ladders.

Q. You are building what building at the present time?

(Testimony of Henry George.)

A. We are building a lot of buildings.

Q. In Spokane? [49]

A. We are building a store building for Woolworth's; we are building a garage, and also we are building the Coliseum.

Q. Yes, a little building called the Coliseum. How much is that costing?

A. Well, it is quite a building.

Q. Do you use ladders on that, on all of these buildings? A. Lots of them.

Q. Will you tell the court and jury just what precaution is necessary when you use ladders?

Mr. MacGillivray: Just a minute, we object to that as calling for a conclusion. Of course, it would depend on where the ladders are used, what they are used for, the height of the ladder.

The Court: Yes, it seems to me there would be some difference in the construction we are discussing here and the Davenport Hotel and some of those other buildings. The question here is in relation to a building of this kind.

Q. Yes, as to the use of ladders, how long should they be?

Mr. MacGillivray: That is objected to as calling for a conclusion and an opinion of this witness and it would be immaterial here. Of course we know if you have to go up fifty feet you would have a fifty-foot ladder; if you have to go up ten feet you might have a ten-foot ladder. [50]

The Court: Yes, it seems that you are asking a question that would be rather hard to answer. I

(Testimony of Henry George.)

don't know, but it seems to me that there are ladders of all lengths. But, he may answer, I will permit the answer.

A. A ladder should be long enough to be safe to go to the point you want to get to. If it is three feet high you need a step, if it is six feet you need a ladder.

Q. As to the setting on the ground, how should ladders be set on the ground?

A. A safe rule would be that over the six feet the ladder should be tied both top and bottom, or held by another man.

Q. Is rubbish, broken tile, and so forth, supposed to accumulate around the base of the ladder and around the building? A. No, sir.

Mr. Funkhouser: You may take the witness.

Cross-Examination

By Mr. MacGillivray:

Q. Mr. George, have you ever built any one-story school buildings? A. Yes, sir.

Q. As a means of access to the roof of one-story structures [51] ladders are universally used, are they not?

A. They used to be, but sometimes they use scaffolds.

Q. You use scaffolds on multiple story buildings?

A. We use them on one-story buildings, it depends on the outside finish.

Q. It is customary to use ladders, is it not?

(Testimony of Henry George.)

A. Yes, we use ladders to get to the roof. We have ladders down there on the Coliseum building now, too, lots of them.

Q. How many ladders have you down on the Coliseum building? A. How many?

Q. Yes.

A. Well, our work is about cleaned up there now, but I would say there is a dozen of them there and some of them fifty feet high.

Q. They are various lengths?

A. Some of them are fifty feet.

Q. And down to what? A. Ten.

Q. Are those portable ladders?

A. Yes—the long ones are not portable.

Q. The short ones, say ten or fifteen or twenty feet? A. Yes, they are portable.

Q. And you use those dozen ladders at various places around the Coliseum? A. Yes, sir. [52]

Q. And in using them at various locations around the building do you mean, Mr. George, that you always tie the ladders at top and bottom?

A. Yes, sir, if I find one that isn't, someone gets called. It is a safe rule. I have had two falls myself and I don't want any more.

Q. You had two falls from ladders?

A. Yes, sir.

Q. When was the last one, how recently?

A. Oh, twenty or thirty years ago.

Q. In the construction business it frequently happens that men fall from ladders, do they not?

(Testimony of Henry George.)

A. Yes, they do, that is why we have to tie them down.

Q. And it still happens, does it not?

A. It hasn't happened on one of my jobs for a long time.

Q. But it happens in the construction business, does it not, to this day? A. Yes.

Q. You have known Mr. Pehrson for about forty years? A. Yes.

Q. And he has been the architect on many jobs that you have had?

A. Well, we haven't done a job for him for about fourteen years.

Q. Well, previous to that have you been on the same job?

A. Yes, he was architect on the Florence Hotel at Missoula—he [53] was the architect on the Buick building that we built in Spokane. He was the architect on the St. Augustine school, but for the last ten or fourteen years we have not been on any of his work.

Q. Mr. Pehrson has been on these inspection trips and on construction work and he knows all about construction work, is that not correct?

A. I think so.

Q. And he knows or should know, all about the use of every kind of ladder on construction work?

A. Yes, he writes the specifications.

Q. In other words, there is no one that should know about the use of portable ladders on construction jobs any better than Mr. Pehrson?

(Testimony of Henry George.)

A. That is right.

Mr. MacGillivray: That is all.

Mr. Funkhouser: That's all.

R. C. WURST

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Funkhouser:

Q. Will you state your name to the court and jury?

A. R. C. Wurst, they call me Bob.

Q. Where do you live, Mr. Wurst?

A. Couer d'Alene. [54]

Q. How long have you lived in Couer d'Alene?

A. About six years in Couer d'Alene but I have lived near since 1919, that is, in the vicinity of Hayden Lake.

Q. Over one-third of a century? A. Yes.

Q. What is your occupation?

A. I am contracting.

Q. How long have you been contracting?

A. For six years.

Q. What kind of buildings?

A. Residential, some commercial, and small industrial.

Q. Have you ever worked with Mr. Pehrson on buildings? A. On one job.

Q. Was that comparatively recent?

A. In 1948 and 1949.

(Testimony of R. C. Wurst.)

Q. In the construction of buildings, do you try to comply to the best of your ability, with the rules and regulations set forth by the building code?

Judge Hawkins: We object to that as calling for a conclusion of the witness.

The Court: The objection will be sustained.

Q. Have you ever built buildings where ladders were involved?

A. On most of the jobs we use ladders.

Q. Do you or do you not try to supply ladders of sufficient [55] length to reach the buildings without difficulty, or where you intend to go on the building?

A. Yes, sir.

Q. As to the allowing of waste material to accumulate around the building at the base of ladders, do you try to keep that all removed?

Judge Hawkins: We object to what he tries to do, the question is what was done in this case.

The Court: That is true, but I am going to allow him to answer.

A. We keep a clean-up man on the job, and the rules state——

The Court: Never mind what the rules state, just what you did and what you do.

A. We keep the rubbish away from the building and normally piled up away from the building and we normally haul it off when it accumulates in a truck load.

Mr. Funkhouser: You may take the witness.

(Testimony of R. C. Wurst.)

Cross-Examination

By Judge Hawkins:

Q. But that rubbish does accumulate in piles does it not, Bob, and then you move it when you get a pile?

A. We gather it up normally in the course of the work in a day in a large pile away from our work. [56]

Q. But there are accumulations that you put in a pile during the day, you don't pick up each scrap as it falls, and dispose of it as it falls, but you let it accumulate and then move it in an orderly fashion in a wheelbarrow or some other conveyance?

A. Yes, you get an accumulation.

Q. In piles?

A. In piles under those circumstances, yes.

Q. As it falls it might scatter itself around the edge of the building and then you will scoop it up or shovel it up in piles and haul it away?

A. You usually haul it in wheelbarrows, haul it away as it accumulates.

Q. But you do get piles of scrap material and things of that kind that accumulate until it is moved? A. That is true.

Q. Now, in the use of ladders on the buildings that you have worked on are all of your ladders equipped with apparatus to fasten them at the top and at the bottom?

A. Practically all of the jobs that I have been on are one-story jobs.

(Testimony of R. C. Wurst.)

Q. One-story jobs? A. Yes.

Q. What kind of a ladder do you use on a one-story job?

A. We use stepladders, especially on inside work where you have level floors, and on the outside we use lean-type [57] ladders.

Q. Rung ladders?

A. Yes, rung-type ladders.

Q. And by lean-type, you mean that you lean them against the buildings and walk up?

A. Yes, you lean them against the building and walk up.

Q. And they are the regular type of ladder, lots of them are made of two by fours with steps nailed on or inserted in?

A. Yes, or manufactured ladders.

Q. And you use those ladders, that type of ladders, on one-story buildings to get to and from the roofs to work or to inspect the work on the roofs?

A. Yes.

Q. Is a sixteen-foot ladder an uncommon length of ladder to be used on a one-story building?

A. No, a sixteen-foot ladder is a very common length of ladder.

Q. Now those ladders, on working around a one-story building or structure, you move them from place to place as the need requires, do you not?

A. Yes.

Q. And you don't fasten them to the building each time you use them?

A. If we have solid footing—we very seldom

(Testimony of R. C. Wurst.)

fasten the top unless you can't secure them at the bottom—if [58] we have solid footing at the bottom we never or very seldom fasten them on top.

Judge Hawkins: I think that is all.

Redirect Examination

By Mr. Funkhouser:

Q. And if your ladders are not fastened, they are substantial enough to reach the top of the building, are they not? A. Yes.

Q. And standing on a firm foundation, are they not? A. They are on a firm foundation.

Mr. Funkhouser: That's all.

Judge Hawkins: That's all.

(Mr. Pehrson recalled and direct examination continued.)

G. A. PEHRSON

Direct Examination

By Mr. Towles:

Q. Mr. Pehrson, we had reached the point where you had been operated on, and you had been under anaesthetic from nine o'clock in the morning until one o'clock at night? A. Yes.

Q. Now then, when you came to were you in a bed at the hospital? A. Yes.

Q. How long did you remain in bed and under what conditions, until you were able to sit up?

A. I wasn't allowed to sit up, I had to lie on my

(Testimony of G. A. Pehrson.)

back for five weeks. I couldn't move any place because of the [59] fact that they wouldn't let me move. My leg was in the air with weights on my leg and the nurse would try to clean me up once in awhile—every morning—but she couldn't turn me over and she would have to reach under my back, the position I was in for so long made my back terribly sore, it was just agony. I got no rest, because I couldn't, I couldn't get any sleep, it was too painful, particularly a point on my back got so terribly sore and the nurses tried to relieve it by using rubber rings on it. I don't know just how to say it but you lie in bed for five or six weeks and can't move, the whole system gets in terrible pain, I don't know how to tell you except that it was so painful it was unbearable, but I had to live through it.

Q. And what happened when they tried to sit you up in a chair?

A. After about six weeks, the nurse that was with me constantly—after the operation I had two nurses that were on special, nurses that were with me constantly and after one week Doctor Adams said "I don't believe that we need more than one nurse" and he said to discharge one and so I kept one nurse from then on during the entire period that I was in the hospital and that lady took care of me, she came in in the morning at seven o'clock and tried to give me a bath, she tried to do everything for me and she left at three o'clock [60] and from then on my wife would sit with me most of

(Testimony of G. A. Pehrson.)

time, besides the sister with me every day from three o'clock to nine o'clock and the regular hospital nurses took care of me during the other hours.

Q. Now then, let's get to the point of where they tried to sit you up in a chair.

A. In about six weeks I was told that I would have to try to get up in a wheelchair. One day the nurse moved in a wheelchair and she called in two assistants, one man and another nurse and they lifted me up and put me in a wheelchair. That was worse than lying in bed, and so I fainted, but I came to quickly but it was so painful that I didn't have much interest in the wheelchair but the doctor and the nurses said "You must be up, it will help you, if you lie there you will be useless entirely." They took me up a few minutes every day. They had to get three people to lift me out of bed and three people to put me back in bed.

Q. And that went on in the hospital until what date?

A. On the 4th of November the doctor and the nurse had a consultation and decided to let me try out a walker, it is an apparatus like you see babies use when they start to walk. The nurse wheeled the walker in and she tried to help me turn around in bed and practically lifted me into the walker. It has a seat and a bar [61] on each side and it has casters under it and you can move yourself, but I was instructed not to use my right leg at all, I couldn't touch my right leg to the floor so I at-

(Testimony of G. A. Pehrson.)

tempted to move myself with my left foot as much as I could but the success was poor. After three days, and all of that time I was in the most terrific pain, the doctors decided that I could go home, on the 8th of November. The nurse, a special nurse, and my wife came and took me home in the ambulance.

Q. How long were you at home before you went back to the office?

A. After about a month at home the doctor gave me some crutches and said "Try these out and see what you can do." I did, and I finally managed to move around a little bit on the crutches and two months after I got home—on the 12th of December, my wife took me downtown in the car and I managed to get to the office.

Q. How long have you been under the care of those surgeons?

A. I am still under their care.

Q. Do you know how long you were totally disabled on account of this accident?

A. Well, if it wasn't for the horse constitution that I have got, I would still be useless.

Q. What was the condition of your health at the time of the injury? [62]

A. Fine.

Q. You were a strong, robust man?

A. As healthy as I ever have been.

Q. Do you know yourself whether or not your injuries are permanent?

A. The doctor tells me they will be——

The Court: Now just a minute, Mr. Witness——

(Testimony of G. A. Pehrson.)

Q. I asked if you knew of your own knowledge.

A. They will be, I am positive, because I cannot use my leg, I cannot step on it. I don't know what the future is going to bring, but I have resigned myself to the fact that I am going to be a cripple for life.

Q. What effect have these injuries had on your earning capacity as an architect?

A. When I got hurt we had five million dollars worth of business and now I haven't got any.

Q. And what have you had to do in your office in the way of letting people go who were in your employ?

A. You say what did I have to do?

Q. What did you have to do about letting the draftsmen go that were in your office?

A. I had to lay them off.

Q. How many men did you have working for you at that time?

A. I had eight draftsmen, a secretary, an accountant and one man outside. [63]

Q. Who do you have now in your office?

A. I only have the secretary and accountant.

Q. You testified that you had five million dollars worth of business when you had this accident, what do you mean by that, will you explain it to the jury?

A. That means the business that we had in the office, we had twenty projects. We had two schools at Mountain Home, we had one at Mackay, we had the Bonner County Schools—it meant the gross value of the business that we had, it was five mil-

(Testimony of G. A. Pehrson.)

lion dollars' worth of business that we had at the time of the accident.

Q. That was the amount that was involved in the contract, was that it? A. That is right.

Q. Can you give us a rough estimate of your earnings for the past three years prior to the time of your accident?

A. The average was approximately eighteen thousand dollars a year.

Q. Have you secured any new business since the accident? A. No.

Q. Why not?

Mr. MacGillivray: That is objected to as calling for a conclusion of the witness. There might be several factors involved.

The Court: Yes, but I will let him answer. [64]

A. Specifically I can mention four jobs. Four projects that I was told that I could not take them on because I was crippled. They were large projects, one project was an elementary school at the Mountain Home Airbase. I had done two schools for the district before but I was told that due to my condition they could not let me take it on. There was two stores for Newberry's, one at Bellingham, Washington, and the other at Salem, Oregon, and they said "We cannot depend on you because you can't get around." Before the accident I had made some preliminary drawings for a hospital at Clarkston, Washington, a \$750,000.00 job—the decision was by the Board for the selection of the architect. I was assured of the project by the board, but the

(Testimony of G. A. Pehrson.)

selection was made one week after the accident and I sent one of our men down and they told him that due to the accident they could not consider us, and so I know that I lost those and two other jobs, two and a quarter million dollars. I cannot say for sure about them, but I know that usually when I get called in for a consultation on two different times that I usually cinch the job, but I lost them.

Q. Mr. Pehrson, are you fitted for any other calling other than an architect? A. No, sir.

Q. Handing you Plaintiff's Exhibit number twelve, will you please state what that consists [65] of?

A. That is a statement of my hospital bill, the doctors' bills and the nurses' bills that took care of me, and the cancelled checks.

Q. Does it have a total there? A. Yes.

Q. And do you know that these are the costs of the expenses in connection with this accident?

A. Yes, sir.

Mr. Towles: I will offer this exhibit in evidence.

Mr. MacGillivray: May we have until after lunch to examine this?

The Court: I will admit it at this time and then I will strike it if there is any reason to do so. I will take judicial notice of the life expectancy of a person of the age of the plaintiff in here and I will give that in an instruction to the jury.

Mr. Towles: Then I don't need to put that in?

The Court: No, you don't need to do that. I will state that to the jury.

(Testimony of G. A. Pehrson.)

Q. In connection with these injuries are your pains in the right hip continuous or not?

A. Up until about four months ago they were continuous—they were continuous day and night, but up to a certain [66] point I got so used to them that I could stand it—in the first place I am strong-minded and I made up my mind that they would not bother me but they were continuously painful, but they did ease up about four months ago and that lasted until, I think it was last Thursday. During that time I could sit without feeling anything back in here (indicating) and I could lie in bed without feeling anything, but after last Thursday the pain came back and it has been there. It has been very painful during the last week. Before that time I was at least much easier at night, but last week it has been kind of bad and now, I will go a little further and say that when I step on my leg it is terribly painful, that is why I cannot walk good now.

Q. Will you show the jury how you walk?

A. Yes. (Demonstration to the jury.)

Q. Do you suffer pain when you walk?

A. I suffer pain every time I step on my leg; that is why I limp so badly. I favor it and I try to put the weight off that leg.

Q. And what about your shoulder?

A. Only when I try to lift and, say, from this point (indicating) on, it is terribly sore. After a night's sleep it is terribly painful in this way, I

(Testimony of G. A. Pehrson.)

can't move it good. After I get it limbered up it is not so bad.

Q. You mentioned last Thursday, what happened last [67] Thursday?

A. I, at your request, went to be examined by Dr. Wallace and I went to his office.

Q. Who is Dr. Wallace?

A. He is a bone specialist, an orthopedic doctor.

Q. Was he acting as doctor for the defendant?

A. I think he was for the defendant.

Q. You went to him? A. Yes.

Q. And what did he do?

A. He examined me thoroughly.

Q. What did he do in the way of x-ray?

A. He said he would have to have two x-rays.

Q. How did that affect you?

A. Well, I have to say this that every time I had an x-ray the bones and muscles became numb and painful and that happened again when I had this on Thursday.

Mr. Towles: That is all for the present.

The Court: We will recess at this time until one-thirty this afternoon.

October 21, 1954, 1:30 P.M.

Mr. Towles: I have another question I desire to ask if I may?

The Court: You may do so.

Q. Mr. Pehrson, at the time of your accident will you state what the condition of the ground was around the base of [67-A] this ladder?

(Testimony of G. A. Pehrson.)

A. The ground, as I previously stated, had been filled up to a certain height from material from the excavation. On top of that it made a sort of little hill or a raised portion at the point where the ladder stood. Back of the ladder, particularly along there, was piled some rubbish, some broken boards, and some broken concrete blocks and also some cuttings, and some of those boards were also in front of the ladder, so that when you were ready to climb up the ladder you had to step on some of the boards. And I will have to state here that I don't believe that at any time I saw the exact position of the two standards of the ladder. The ground in there was so filled up with short pieces of lumber and rubbish that I don't think at any time that I saw the two standards of the ladder on any particular part of the ground there. That pile was just rubbish and was intended to be hauled away.

Q. Did you notice that before the accident?

A. Yes.

Q. How long?

A. Well, I cannot answer that definitely but—no, I won't attempt to answer that as to how long, but it was there before the accident.

Mr. Towles: That is all, you may [68] cross-examine.

Cross-Examination

By Mr. MacGillivray:

Q. Mr. Pehrson, you have been practicing your profession for about fifty years? A. Yes, sir.

(Testimony of G. A. Pehrson.)

Q. And during that period of time you have supervised the construction of about how many buildings?

A. I think probably in that time I have supervised somewhere between sixteen hundred and two thousand.

Q. And those were buildings from one-story structures up to buildings as big as the Davenport Hotel?

A. Yes.

Q. One of your duties as an architect is, after the plans and specs are drawn and the contract let, is to make periodic inspection tours of the construction to see that it is progressing in accordance with your plans and specifications?

A. Yes.

Q. And when you make those inspection trips you inspect the buildings from top to bottom?

A. That's right.

Q. On a ten-story building you would start at the top and work to the bottom, or vice-versa?

A. Yes.

Q. And on a one-story building you inspect the foundation, the walls, the interior, the roof, and all parts of the building? [69]

A. Whatever is completed to a point that it is necessary to check.

Q. And during these fifty years you have used ladders, portable stepladders, in the inspection of, would you say on thousands of occasions?

A. Yes; I would say so.

Q. All types of ladders and of different heights?

A. Yes, sir.

(Testimony of G. A. Pehrson.)

Q. So from that experience you are thoroughly familiar with the use of all types of ladders used on construction projects?

A. I thought I was.

Q. Well, you were, weren't you?

A. Yes; I would say that I was.

Q. And from that fifty years of experience, and the using of stepladders during that time, you knew all of the problems that anyone would encounter in using stepladders, didn't you? A. Yes.

Q. Had you ever fallen from a stepladder before, Mr. Pehrson?

A. Yes; I had fallen, I would say, six or seven times.

Q. Six or seven times? A. Yes.

Q. And that is over this period of fifty years?

A. Yes. [70]

Q. And was that from losing your balance while climbing or from different causes?

A. It was mostly in losing my balance.

Q. You say that you have broken your arms and your legs and that Doctor Adams took care of you. Now, then, was that from falls from ladders previously? A. Yes.

Q. And is this the first time you have ever had a lawsuit over falling from a ladder, losing your balance? A. I never had a lawsuit before.

Q. The contract was made the latter part of March in 1952 between the school district and the Lauch Construction Company?

A. I think the contract was in May.

(Testimony of G. A. Pehrson.)

Q. How soon after the contract was signed, Mr. Pehrson, did the construction start?

A. I believe immediately.

Q. And first they do the excavating, pour the foundation and then build up from there?

A. That is right.

Q. And immediately after the construction started did you start to making your inspection trips to the site? A. Yes.

Q. About how often?

A. About once a week, our agreement is with the owners that we cover the job once a week. [71]

Q. Did I understand that you have five jobs in this locale that you inspected on each of these trips up here?

A. We had two in Priest River and one in Sagle.

Q. Were they school jobs?

A. Yes; they were all for the Bonner County School District.

Q. Were they all one-story buildings?

A. Yes; excuse me, the remodeling of the Priest River was a two-story elementary school building and the remodeling of the Clark Fork school that was a part of a two-story building.

Q. What other one-story school projects did you have up this way at that time?

A. That was the only one-story project here, I had some in Southern Idaho.

Q. Didn't you have a one-story school building up at Pack River that was being constructed at that time? A. Yes; that was the one.

(Testimony of G. A. Pehrson.)

Q. Mr. Pehrson, the foundation on this Cocolalla school, how deep was it?

A. Part of it was down—well, the plans showed it four feet and six inches but a portion of it had to be carried a little deeper because the formation was such that we couldn't have the footings that high, a portion of it was carried on perhaps about a foot deeper.

Q. What was the depth of it in there by the front entrance, [72] on the front of the building, what was the depth of the foundation there, from the brickwork down?

A. I think at that point the plans showed it four feet and six inches and I think that we added a foot, but I am not sure about that but it was close to that.

Q. And on one of these exhibits, I think it was on that scale model that you have—you have a line across the foundation designated finish line?

A. Yes.

Q. Do I understand that on September 12 that the ground level was about three feet below that finish line? A. As near as my notes show.

Q. Mr. Pehrson, to refresh your recollection, don't you recall that Mr. Richardson of the Lauch Construction Company had his large equipment in there some considerable period of time before the date of your fall and that he backfilled and leveled it out there and that there was no grading after your fall, except some fine hand grading?

(Testimony of G. A. Pehrson.)

A. No; that isn't correct.

Q. Are you sure of that?

A. Yes; I am sure that isn't correct.

Q. On September 12th, if I get you correctly, Mr. Pehrson, let me ask you was that slab in there at the front entrance?

A. Yes; I think it was. [73]

Q. Then, if I understand you, with that slab in, getting off that slab at that time you had to step down three feet?

A. No; there was a plank laying on the steps down to the grade, to walk up on.

Q. You mean the plank was on an angle?

A. Yes; on an angle, on the slab to the ground in front of the steps approximately three feet below that slab, yes.

Q. Then, Mr. Pehrson, about when did you make your first inspection of the roof on the Cocolalla school?

A. Oh, I think a week prior to the 12th of September, probably two weeks.

Q. I thought you stated that you had been up that ladder many, many times onto the roof?

A. Well, I had been up that ladder, I wouldn't want to say definitely how many times but I think I must have been up there three or four times—two or three or four different times. That was in September and I think I was probably up there altogether about ten times.

Q. Prior to September 12th, the date of this

(Testimony of G. A. Pehrson.)

fall, you had been up on this roof, the roof of that building, at least ten times?

A. I would say so; yes.

Q. And that would be inspecting the work on the parapet walls and the roofing as it [74] progressed?

A. On some part of it, yes. There was a concrete bond beam over the windows that had to be looked after and then after they began to put some of the partitions in and some of the glued laminated beams in, and all of that had to be looked after during that period of time every so often.

Q. And during these periodical inspection trips you had been all around the outside of the building, that is, prior to the day of your fall? A. Yes.

Q. Mr. Pehrson, do you recall that they had three ladders around that building, all of which were used to get to the roof of that building?

A. There was one ladder that was used to get to the bond beam and there was no ladder at any time, to my knowledge, that went up to the roof.

Q. Mr. Pehrson, on the north side don't you recall about a twenty-foot ladder used to get to the roof there? A. No; not to my knowledge.

Q. Would you say there was not such a ladder there used to get to the roof?

A. Not to my knowledge.

Q. Do you recall any ladder on the premises now that had been used and was used to get to the roof on the west side of the building?

A. No; not to my knowledge. [75]

(Testimony of G. A. Pehrson.)

Q. And to your knowledge the only ladder on the construction site was the ladder on the south side of the building that you used on September 12th? A. Yes, sir.

Q. And is that the only one that you ever used?

A. That is the only one I ever used.

Q. And that is the means of access that you had used to get to the roof at least ten times prior to the date of your fall? A. I would say so.

Q. Mr. Pehrson, you said that on different occasions the ladder was never in the same position, will you explain to us just what you mean by that?

A. Yes; it was mostly left in the position that the previous man had left it, when a man climbed off that ladder under any kind of procedure it probably moved, it did for me. I had to be careful to see that I didn't fall.

Q. Had you ever seen the ladder in front of the canopy, leaning against that canopy?

A. No, sir.

Q. And what do you mean by the ladder being in different positions then is that when John Jones or some one of the laborers came down off the ladder he might have moved the ladder so that it was not balanced properly and it would remain in that position, is that what you mean? [76]

A. That is right.

Q. In other words, from your experience, you often knew that the ladder might be standing in some defective position, is that right?

A. Yes; I will have to say that it is second

(Testimony of G. A. Pehrson.)

nature for us to accept ladders out of position and we try as much as possible to right them before we use them.

Q. And on each and every occasion or time prior to September 12th, had you manipulated the ladder before you used it to see that it was solidly set on the ground and solidly set against the building before you used it?

A. I cannot answer that it was solidly on the ground. As I said on my direct examination the ground was covered with rubbish and some material there and it was hard to see it. I recall, as I have said to you before, that when Mr. Hurst started up the ladder, I felt it move.

Q. I am talking about previous times, Mr. Pehrson.

A. Yes; on previous times if it appeared that it wasn't right, you would try to move it.

Q. On previous occasions, each and every time that you used that ladder, Mr. Pehrson, did you make sure that it was set solidly and firmly on the ground? A. No; I don't think I have.

Q. By that, Mr. Pehrson, do you mean that on different occasions you just took a chance that it wouldn't slip and that you wouldn't fall? [77]

A. I would say so.

Q. You would take a chance?

A. I think that's right.

Q. To check the ladder and see that it was set on the ground or to set it on the ground and to be sure that it was firmly fixed and firmly set upon the

(Testimony of G. A. Pehrson.)

ground, would be a matter of two or three minutes' time? A. It would, but I believe——

Q. That is all; you have answered it; it would take two or three minutes to see that it was set solidly and steadily on the ground before you used it? A. I would like to qualify that——

The Court: You just answer the questions, Mr. Witness; your counsel will take care of whatever is necessary.

Q. Would it take any longer?

A. No; it probably wouldn't take over ten seconds.

Q. Then on each and every occasion previous to September the 12th, when you used that ladder, did you see that it was set in a straight line and set firmly against the building before you stepped on it?

A. I would say that I did not inspect it that close.

Q. And in that regard, Mr. Pehrson, also on occasions prior to September 12th, you had just taken a chance that it was set well enough against the building that you would not lose your balance and would not fall? [78]

A. I think that is right.

Q. Then from your experience in using ladders thousands and thousands of time, you, of course, realize that if the ladder was off balance, if one standard was resting on the ground and one standard against the building, there was a probability or at least a good possibility that you might encounter trouble in going up the ladder? A. Yes.

(Testimony of G. A. Pehrson.)

Q. Now, going to September 12th, you went up to the site after talking at the Cocolalla Store to Mr. Hurst who was one of the school board members, is that right? A. Yes.

Q. Did I understand that you just dropped in to the store to tell Mr. Hurst that you were on the job to make an inspection?

A. Yes; that is right.

Q. You went up to the building and made an inspection of the ground floor, the downstairs portion of the building? A. Yes.

Q. Had you gone clear around the building?

A. Yes.

Q. Did you see these other two ladders?

A. No.

Q. Did you see the other ladders on the north and the west side of the building? [79]

A. No; I didn't see any ladders up to the roof.

Q. Did you see any lying on the ground?

A. I don't remember whether it was on that trip or not but I saw a ladder that was used to reach the bond beam when the concrete was poured in the bond beam and I used that ladder sometimes but that didn't go to the roof. That just reached up to the bond beam and the bond beam was about a foot and a half above the windows.

Q. This ladder that we are speaking about was a sixteen-foot ladder? A. As far as I know.

Q. And do you recall that the side standards were made of two by fours? A. Yes.

(Testimony of G. A. Pehrson.)

Q. And the rungs, about what distance apart were they?

A. I couldn't answer definitely on that, but I think it was the standard type, about fourteen inches.

Q. And the rungs were constructed of one by fours? A. Yes.

Q. And the ladder itself was soundly and solidly constructed, was it not?

A. It was the type of ladder that you would expect to have in a sixteen-foot ladder.

Q. It was a soundly constructed ladder? [80]

A. Yes.

Q. And it was sound and sufficient to carry you or anyone else up that ladder?

A. That is right.

Q. As I understand it, after you made the inspection on the ground floor, Mr. Hurst said that he wanted you to see something on the roof?

A. Yes.

Q. You didn't know what it was?

A. I didn't know what it was, it was something about the roofing.

Q. When you were inspecting on the ground floor or level inside of the building, there were a number of workmen in the building? A. Yes.

Q. Do you recall when you walked outside, did you go out the front door when you left the inside of the building?

A. Yes, I am pretty sure we did—well, well,

(Testimony of G. A. Pehrson.)

no, we may have gone out to the multi-purpose room, I am not sure about that.

Q. When you and Mr. Hurst went up the ladder, when Mr. Hurst started up, do you recall a couple of cement finishers on the foundation wall to the left of you working there?

A. I don't recall that.

Q. You mean that they were not there or that you don't [81] remember?

A. I can't remember, there were so many around there, I didn't notice that very much.

Q. There were some workmen immediately inside the door of the building, you know that?

A. Yes.

Q. And then, as I understand it, Mr. Hurst went up the ladder first? A. Yes.

Q. When Mr. Hurst was climbing the ladder, what did you do, did you brace the ladder for him?

A. No, I just stood there and leaned against—well, I had my hand on the ladder, I have a habit of never going on a ladder with another man on it so I just waited there. I stood there and held onto it.

Q. Which hand did you have on the ladder?

A. My left hand.

Q. That was not for the purpose of bracing the ladder, was it? A. No.

Q. Then Mr. Hurst went up the ladder and stepped off onto the balcony or the ledge or whatever we call it, and then he stepped up over the parapet wall, is that correct?

(Testimony of G. A. Pehrson.)

A. Well, I more or less lost sight of him after he was off the ladder. I wasn't interested in his movements and I began to think of my own position. I intended to climb [82] up the ladder, but I am positive he was over the parapet when I started or before I started up.

Q. Did you watch him go up the ladder all the way? A. Yes, I did.

Q. And get on the ledge or the canopy and over the parapet?

A. Well, I am not positive that he was over the parapet wall, but I think he was.

Q. He was off the ladder before you started up?

A. Yes, he was off the ladder.

Q. And that was before you started up?

A. Yes, sir.

Q. You said on direct examination, Mr. Pehrson, that before you started up the ladder you moved it back?

A. Yes, I know that I moved it slightly, I don't know how much. I made an effort to move it, I felt it move away from the ledge to begin with while Mr. Hurst climbed up and I know that I made an effort to move it back. I don't know how much I moved it back.

Q. As Mr. Hurst climbed up the ladder, you had your left hand on it? A. Yes.

Q. And when he got off the ladder, you felt the ladder move? A. Yes.

Q. Which way? [83] A. To the left.

(Testimony of G. A. Pehrson.)

Q. About how far did the ladder move at the top would you say?

A. Well, now I don't know. I felt it move—in other words, I don't know just how much because I wasn't too much interested in measuring the distances right then, but thinking about it afterwards it appears that it should have moved about two inches where I had my hand.

Q. You say where you had your hand?

A. Yes, I would say about five or six feet from the bottom there.

Q. And that would mean it moved how far at the top of the ladder?

A. That would mean it moved about six inches, maybe four to six inches.

Q. Then your testimony now is that you did something about moving the ladder back?

A. I made an effort to move it back, but I don't know how far I moved it.

Q. You don't know how far you moved it?

A. No, I don't know.

Q. You don't know whether you got it solidly back on the ground, that is both standards?

A. No, I don't. I couldn't see the standards because there were pieces of board around there, short pieces of board.

Q. Loose boards? A. Yes. [84]

Q. And you didn't take the three or four seconds that would be necessary to pick them up and look at the standards?

A. We never do that about the building.

(Testimony of G. A. Pehrson.)

Q. But the question is, you didn't do it.

A. No, I didn't do it.

Q. So that when you started up that ladder, Mr. Pehrson, you don't know whether both legs of that ladder were resting on the ground?

A. I am not positive.

Q. You didn't know whether they were?

A. No, I didn't know, as I say, I didn't see them.

Q. Then what were you doing, were you just taking a chance that they might be on the ground and that you wouldn't have any trouble?

A. That is absolutely what we usually do.

Q. And was that what you did that day?

A. I probably did.

Q. Did you know on September 12th before you started up the ladder whether the top of the ladder was resting securely against the wall?

A. No, I didn't know that.

Q. You didn't know that? A. No.

Q. You figured that day as you had previously that you would take a chance that they would both be against the wall and that you would not have any trouble? [85]

A. I have done it many times before and I felt that I could do it again.

Q. And you did do it again?

A. I did do it again.

Q. Mr. Pehrson, without going to the trouble of moving the ladder back at all after you felt it move, after Mr. Hurst got off—first, do you recall giving

(Testimony of G. A. Pehrson.)

your deposition, I am not sure whether it was in Mr. Towles' office—I guess it was in Mr. Funkhouser's office, on the 6th of this month?

A. Yes, sir.

Q. At that time, Mr. Pehrson, didn't you tell me that you didn't then recall whether you tried to move the ladder back to its original position or not?

A. I don't recall what I said at that time.

Q. Mr. Pehrson, do you recall these questions asked and these answers given?

“Q. Then as Mr. Hurst got off the ladder and went over the parapet wall and out of sight, it was then that you started up the ladder?

“A. That is right.

“Q. And as you say, as he got off the ladder he apparently moved it to the left up at the top?

“A. I felt it did, yes.

“Q. Would you say that it moved about four inches at the top? [86]

“A. I would say that that is about what it would be.

“Q. And whether you moved the ladder back into position before you started up or not, you don't recall? A. I don't recall.”

A. I don't recall that we moved it back into position, I don't know what position it should be in—I know that I attempted to move it but I don't know the position that I moved it to. I can't tell you that.

Q. How old are you, Mr. Pehrson?

(Testimony of G. A. Pehrson.)

A. Sixty-eight.

Q. And this happened a little more than two years ago? A. Yes.

Q. So that your memory then was probably better than it is now?

A. That is right, I have gone through a lot since then.

Q. I realize that. When you were in the hospital and afterward while you were home, didn't you write up a statement in your own handwriting as to just what happened on September 12th, and how the accident occurred and as to what you did?

A. Yes, sir.

Q. And when you wrote that up your memory was a lot fresher on it than it is now?

A. My memory then—I was under the influence of a lot of [S7] dope and part of the time my memory wasn't so good then either.

Q. And after you did that didn't you take your handwriting notes down to your office and give those notes to your own stenographer and have her type them up? A. Yes, sir.

Q. And after she typed them up, you read over the typewritten sheets, did you not?

A. I don't think that I read them. She laid them on my desk, but I don't think that I read it.

Q. After she typed it up didn't you make some corrections?

A. Some corrections were made. I read a part of it but I don't think that I read it all.

(Testimony of G. A. Pehrson.)

Q. You made some corrections on a sheet of the statement?

A. I don't know about that.

Mr. MacGillivray: Attached to the discovery deposition in the original file with the clerk is the statement I have referred to and I would like to have it marked as an exhibit.

The Court: The deposition may be published.

Q. Mr. Pehrson, you have in your hand what is marked as Exhibit number thirteen. I will ask if that is not the original typewritten statement prepared by your stenographer in your office under date of April 12, 1953? A. Yes, sir. [88]

Q. And on each sheet of that exhibit there is in printing by your own hand, is there not, in pencil, filling in certain measurements and certain words that were left out by your stenographer?

A. That is right.

Q. And those corrections were made by you subsequent to April 12, 1953, when the document was typed?

A. That is right. It appears that I went through it all and there are corrections on each and every page.

Q. Then the information in that document prepared by yourself and typed by your secretary or stenographer should be correct, should it not?

A. I didn't get that.

Q. The information and the statements made in that document prepared by yourself and transcribed by your stenographer some six months after this

(Testimony of G. A. Pehrson.)

accident occurred, should be correct, should they not? A. I will have to say no to that.

Q. Why not?

A. That was written under—some of it was in the hospital and I was on my back and only about half right. I had merely made this out—I didn't have any intention of writing anything that was in every way a correct statement of fact, I will have to say that. I didn't know that it was ever to be used in a court room.

Q. When were you released from the [89] hospital? A. On the 8th of November, 1952.

Q. And then you started going back to the office on the 12th of February?

A. I was then on crutches and my wife took me into the car and I got to the office for a half hour a day.

Q. When did you start going down permanently to the office?

A. From then on I went every day.

Q. So that on April 12, 1953, when you read over this statement and made the corrections, you were not under opiates or out of your mind, or anything else, were you?

A. I wasn't very good—I will answer it this way that the corrections made were merely some measurements and names that I corrected. I didn't think about the actual facts that were stated in that statement. I wasn't interested in having any definitely correct statement at any time.

Q. And this statement that you term "Narrative

(Testimony of G. A. Pehrson.)

of Accident" was written voluntarily by yourself for your own use at that time?

A. Yes, sir, it was.

Q. Mr. Pehrson, I will ask you if you did not, in that statement, say this concerning the occurrence of this accident "I had made this trip about twelve or fourteen times during the construction of the roof over the building without mishap. At this particular trip Mr. Hurst went up ahead of me and I stood on the ground waiting for him to get off the ladder. I held my hand [90] on one of the rungs of the ladder." Now that is all correct, isn't it?

A. Yes.

Q. "As Mr. Hurst moved off the ladder to the ledge I could feel and notice that the ladder moved to the left." That is correct, isn't it?

A. That is correct.

Q. "From this brief notice it looked that from where my hand was about five feet from the ground, the ladder moved about two inches at that point. Therefore, a quick thought went through my mind that the ladder must have moved about four inches at the top." Now, that is correct up to that point, is it not? A. That is correct, yes.

Q. "Immediately a flash of mind reminded me that I should move the ladder back." Now, that is correct, is it, Mr. Pehrson?

A. Yes, that is correct.

Q. "But as Mr. Hurst had already climbed from the ledge over the parapet and was out of sight and as I did not want to delay him, I started up without

(Testimony of G. A. Pehrson.)

moving the ladder back on its two legs." Now, is that correct?

A. Well, I tried to move it back, whether it was on its two legs or not, I don't know.

Q. You don't know? A. No, sir. [91]

Q. Then without knowing whether the ladder was firmly fixed on the ground at the bottom or firmly fixed against the wall at the top, you started up, hoping that nothing would happen?

A. Not hoping, I was used to those conditions.

Q. You knew that you were taking a chance?

A. I will have to answer that this way—you are evidently not a construction man. We take a lot of chances.

Q. And you did take a chance on September 12, 1952?

A. Yes, I did, and I am taking them every day.

Q. Mr. Pehrson, you say that the ladder was soundly and solidly fixed; do you complain that the ladder was too short?

A. No, the only thing that was said about the ladder—I was talking to Mr. Richardson once and we said——

Q. Mr. Pehrson, I want to know about the ladder. Just what you want the jury to feel that you thought was wrong with the ladder. What do you say was wrong with the ladder?

A. I believe that——

Q. We will go into that later. What do you say was wrong with the ladder?

(Testimony of G. A. Pehrson.)

A. There were two things wrong with the ladder.

Q. And what were they?

A. The ladder was too short.

Q. And what was the second thing? [92]

A. The second was that due to the fact that it was too short it had to be standing too straight up. Ordinarily a ladder should be off one-fourth of its height from the perpendicular, and this was about three feet from the building and it should have been about four feet, so that it wasn't leaning good enough against the building. This was necessary for if it had been moved out any farther it could not have been left there at all, it would have been in the window.

Q. So that the whole thing was that the ladder was too short?

A. It was too short.

Q. Having used that ladder at least ten times prior to the 12th of September, you knew how long it was, didn't you?

A. Yes, I knew how long it was.

Q. And you knew exactly how long it was and just where it reached on September 12, 1952?

A. I did.

Q. Did you feel each and every time that you used that ladder prior to September 12, 1952, that you were taking some hazard and risk in going up the ladder?

A. Not any more than the usual feeling of taking risks, we always take risks.

(Testimony of G. A. Pehrson.)

Q. I am not talking about the usual feeling—did you each and every time prior to September 12th when you climbed that ladder, feel that you were taking a risk in going up the ladder? [93]

A. No, I didn't even think about it.

Q. And how about on September 12th?

A. I didn't even think about it then.

Q. Mr. Pehrson, getting back to this deposition, do you recall that you told me about that at the time we took the deposition? A. Yes.

Q. What was it that you told me that you did recall at that time? To refresh your recollection, Mr. Pehrson, do you recall this question and answer?

“Q. Now, Mr. Pehrson, on September 12 when you started up the ladder did you feel in your own mind that in using that means of getting up to the roof you were subjecting yourself to some danger?

“A. Yes.”

Is that true, Mr. Pehrson?

A. I answered yes.

Q. But is that true today, is that right today?

A. Yes, that is true, it is right today.

Q. “Q. And having been around construction work the past fifty years and on these inspection trips almost daily I presume—— A. Yes.

“Q.—you knew what danger there was entailed in using that means of getting to the roof?

“A. Yes.”

That is correct, is it, Mr. Pehrson? [94]

(Testimony of G. A. Pehrson.)

A. Yes, that's correct.

Q. "Q. And you had had that same knowledge that there was some danger involved in using that means of getting to the roof each and every time that you had gone up that way? A. Yes."

Mr. Towles: I am going to object to this form of cross-examination. I think he should be allowed to determine from the deposition what is in there. He should be shown the deposition and I think the whole document should go into evidence.

The Court: No, I think just the parts that he wants to cross-examine about and I might say that any time the witness wants to look at his answer, he may do so.

Q. Those questions were asked, and you gave those answers? A. Yes.

Q. And they were correct on October 6th, and they are correct today, your answer is correct?

A. Yes, the answer is correct but it must be qualified.

Q. Go ahead with your explanation.

A. It must be qualified to this extent, the question was such that I had to say yes, I couldn't say anything else, there was no explanation. The question should have been qualified, but I had no opportunity to qualify my answer at that time. You were examining me as your [95] own examination and no other question was raised and my answer is correct.

Q. Mr. Pehrson, were not both Mr. Towles and Mr. Funkhouser present at that time and when I

(Testimony of G. A. Pehrson.)

finished with my examination didn't both Mr. Towles and Mr. Funkhouser question you?

A. They did not object to your question. You asked the question and it had to have a yes answer because that is right but there wasn't any objection to your question at that time and I did not have a chance to qualify.

Q. Getting back to the question, Mr. Pehrson, this was the question: "On September 12 when you started up the ladder did you feel in your own mind that in using that means of getting up to the roof you were subjecting yourself to some danger?" And your answer to that was "Yes." Now, do you want to explain that?

A. I want to explain that I said "Yes" and I should have said that those dangers we are always anticipating, we are never walking on a solid board and we are never walking on the floor, we are walking on anything that is provided for us on a construction project. You can talk to any construction man about that, but we have no expectation of having any solid place to put our feet. We have to do this; we have to take all of the precautions that we can and we have to watch and look and see where we are stepping. In the early days [96] when there were no restrictions sometimes we were two hundred feet in the air and walking on an "I" beam and had nothing between us and the basement excavation. We knew at those times and we always know that we are taking some chances.

(Testimony of G. A. Pehrson.)

Q. What precautions could you have taken before you started up that ladder?

A. I could have refused to go up the ladder.

Q. What else could you have done?

A. I don't know any other precaution.

Q. You could have taken the precaution of seeing that both standards of the ladders were solidly on the ground?

A. It may be that they stood on the ground.

Q. But you didn't take the precaution of seeing that they were?

A. As I say, those were the chances that we have to take.

Q. That is one precaution that you could have taken, isn't it, Mr. Pehrson, that is, to lift a couple of boards and see definitely that both standards were set on level ground; you could have done that?

A. But no one would have asked me to do.

Q. But you could have done that?

A. I could have, yes.

Q. And did you do that before you started to go up the ladder? [97]

A. I didn't do it.

Q. You could have checked the top of the ladder and determined definitely if both the standards were set securely against the wall of the building?

A. Yes.

Q. Did you do that? A. No; I didn't.

Q. You started back to work on February 12. Did you spend a full day at the office from that time on or did you work your way into full time?

A. I started about a half hour a day and I kept

(Testimony of G. A. Pehrson.)

adding a little to it and in about a month I was back pretty much a full day.

Q. About some time in March then, you started a full day there? A. Yes.

Q. You have been engaged in your profession as an architect again since some time in March?

A. Yes.

Q. What jobs do you have at the present time?

A. We are finishing the Bonners Ferry Hospital and we are finishing up one high school at Mountain Home, Idaho.

Q. Is that constructed by Buscombe and Rau?

A. No; that was by the Western Construction Company. The hospital at Bonners Ferry is constructed by Buscombe and Rau. [98]

Q. And what about the Newberry job in Yakima?

A. The Newberry job in Yakima, we have that completed now.

Q. When was that completed?

A. That was completed about five weeks ago.

Q. What other jobs have you completed this year?

A. We have completed the high school at Mackay, Idaho, and we had a little to do to complete the high school at Sandpoint, and that is about all.

Q. When did you start going back on these inspection trips?

A. The first inspection trip to Boise and Mountain Home—no, the first trip up here I cannot re-

(Testimony of G. A. Pehrson.)

call, but I think it was about the middle of February.

Q. Of what year? A. 1953.

Q. And you have been making these inspection trips then at least since March of 1953?

A. Yes.

Q. On these various projects under construction? A. Yes, sir.

Q. That would be to Yakima, Bonners Ferry, Mackay and Priest River?

A. No; the Priest River job is finished. I have been at Mountain Home and Mackay.

Q. And possibly Yakima?

A. Yes; possibly to Yakima.

Q. And to Bonners Ferry? [99]

A. Yes, and to Bonners Ferry. I go there now every Monday.

Q. You made a statement, Mr. Pehrson, about a pile of debris on the ground in the vicinity of the ladder? A. Yes.

Q. That was just loose rubbish of the usual type that you find around construction jobs that had been gathered in one pile for disposal?

A. Yes; that is right.

Q. Did you fall on that pile?

A. I fell on that.

Q. Do you recall, where did you fall, was it to the left of the canopy, or in front, or where?

A. When I came to, I was just about in the middle of the ladder out there. I think I was under the ladder.

(Testimony of G. A. Pehrson.)

Q. The ladder was still standing?

A. Yes; it was still standing.

Q. You fell directly back of the ladder?

A. I must have slid over or my balance must have thrown me over because I remember distinctly I was under the ladder when I came to.

Q. Under the ladder?

A. In the space between the wall and the ladder, do you understand?

Q. Yes. Now, Mr. Pehrson, to sum it up briefly, the cause of losing your balance was one of two things, perhaps; one, that when Mr. Hurst moved the ladder when he got off, it [100] had not been resting then squarely against the building at the top or had not stood solidly at the bottom?

A. That is correct.

Q. And neither one of those things did you check?

A. Neither can I tell about accurately.

Mr. MacGillivray: I ask admission of Exhibit Number thirteen at this time, if the Court please.

The Court: It may be admitted.

Mr. MacGillivray: That is all.

Redirect Examination

By Mr. Towles:

Q. Handing you defendant's Exhibit Thirteen, will you state to whom you loaned that statement?

Mr. MacGillivray: That is objected to as immaterial.

(Testimony of G. A. Pehrson.)

The Court: The objection is sustained.

Q. When did you see that statement after you loaned it in April, 1953?

Mr. MacGillivray: That is objected to as immaterial.

The Court: I cannot see where it is material, the objection is sustained.

Mr. Towles: That is all. [101]

Mr. MacGillivray: Nothing further.

The Court: We will recess at this time for ten minutes.

October 21, 1954—2:35 P.M.

DR. FRANCIS BRINCK

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Towles:

Q. Will you state your name?

A. Francis Brinck.

Q. Where do you reside, Doctor?

A. Spokane, Washington.

Q. And where do you have an office?

A. In the Paulsen Medical and Dental Building.

Q. And are you associated with anyone?

A. I am a partner of Dr. Alfred O. Adams.

The Court: Do you admit the qualifications of Dr. Brinck?

Mr. MacGillivray: Yes, indeed we do.

(Testimony of Dr. Francis Brinck.)

Mr. Towles: I would like to go into the doctor's qualifications some.

The Court: Very well, if you don't want to accept the admission of his qualifications [102] you may go ahead.

Q. You are associated with Doctor Adams?

A. Yes.

Q. Will you state your education for us?

A. I was graduated from the University of Alberta in 1940, I did internship at the University of Alberta and the Misocordia Hospital in 1939 and 1940; I interned at the St. Lukes Hospital in Spokane in 1940 and 1941. Following that I went in with Dr. Adams until I was called to the Army. I knew I had some time to do and there was no use making any plans before, so I spent four years in the Army.

Q. Where were you?

A. Principally in the Burmese theater. I was chief orthopedic surgeon in a fifteen-hundred-bed hospital. On discharge from the Army I was resident surgeon at the Shriners Hospital in Spokane. Following the completion of my formal training I went in partners with Doctor Adams. I am certified by the American Board of Orthopedic Surgery—a member of the American Academy of Orthopedic Surgery, a member of the Western Orthopedic Society, North Pacific Orthopedic Society, and the Spokane Surgical Society.

Q. Was Dr. Adams at the Shriners Hospital, too, at the time you were there?

(Testimony of Dr. Francis Brinck.)

A. He was chief surgeon. [103]

Q. When did you first meet Mr. Pehrson, Doctor?

A. That was at the Sacred Heart Hospital in September of 1952.

Q. About September 12th, was it? A. Yes.

Q. Under what circumstances and what time of day was it that he arrived?

A. It was in the evening. I had been called and told that Mr. Pehrson was being brought by ambulance to the Sacred Heart Hospital and that he was having quite a bit of trouble, so I went up and waited until he got there.

Q. When he arrived, what did you do?

A. I had a look at him, made an examination as much as I could at that time to see what the treatment would be.

Q. Did he have some X-rays that came to the hospital at that time?

A. The ambulance brought some X-rays along with them in X-ray frames.

Q. And did you examine the X-rays?

A. Yes; I examined the X-rays.

Q. What did you tell him about what he had to do?

A. On looking at the X-rays that came down with him I was very upset about the whole thing because he had a very bad fracture of the hip. We like to pin these or nail them, whatever term you want to use, because then we [104] can get them off their backs and get them up. On looking at his

(Testimony of Dr. Francis Brinck.)

X-rays everything was so badly shattered that I could not see where I was going to put in a pin and I told Mrs. Pehrson—I think she was with him at that time—I told them at that time that we would like to operate and have an internal fixation metal to hold everything until it healed and I could not see where a metal pin would hold because everything was fragmented so badly. We put adhesive tape on his leg and a weight on his leg over a pulley to relieve some of the pain and we gave him sedation and I left what orders I thought necessary.

Q. Did you see him again the next morning?

A. Yes, sir.

Q. And what did you do at that time for him?

A. The next morning I drilled a wire through the lower end of the femur and another wire through the lower end of the tibia so that I could suspend the leg up in the air and pull it out into place.

Q. The femur is what?

A. That is the big bone in the leg.

Q. Is that the thigh bone? A. Yes.

Q. And what is the tibia?

A. You might call it the big leg bone.

Q. And that was on the right? [105]

A. The right side, yes, sir.

Q. You say that you wired him up some way?

A. I put these wires through, one through here and one through here (indicating) and then I attached wires to ropes and weights and lifted the leg up in the air.

(Testimony of Dr. Francis Brinck.)

Q. What kind of weights are those?

A. They are just round weights, roughly about sixteen, I think, between twelve and sixteen, I believe that sixteen is the maximum.

Q. And then he had to lie on his back in that condition? A. Yes; he was flat in bed.

Q. That was a temporary condition, was it?

A. Well, actually, it turned out to be temporary but I thought it was going to be permanent. I put these wires in and pulled him down and then I X-rayed it again and on the new X-ray I saw where I could get a nail in and a side-plate and fix the fragments together so that he could get off his back.

Q. After you did that, what did you tell him that he would have to do or that he should do in the way of an operation, what did you suggest after you found out that you could do something?

A. I suggested that he have surgery?

Q. And how long was that delayed?

A. Well, I can soon tell you—he came in on the 12th and I put the Kirschner wires in on the 13th and then on the [106] 14th I took my new X-rays—no, on the 14th I ordered the X-rays and on the 15th I decided that he could be operated on.

Q. And what did you advise him if he was operated?

A. I advised him that he would have to lie on his back with these wires and weights and everything until it healed.

Q. Did you tell him anything about the mortality rate in those cases where they were not operated?

(Testimony of Dr. Francis Brinck.)

Mr. MacGillivray: Now, we object to that as immaterial.

The Court: I don't want to hurry counsel at all in the trial of this case, but I believe it would be probably satisfactory to counsel for the plaintiff if you will just let the doctor go ahead and give a full history of this matter. You can save a great many questions because the doctor knows what he did; he knows all about the condition at the time and all about the suffering, and if he will just go ahead and give you a full history of everything that he did and if anything is overlooked, then you can enlarge on it by questions. I am not attempting to tell you how to do this; you just go ahead and do it your own way; that was just a suggestion.

Q. Doctor Brinck, will you just state everything that occurred, in your own words, just tell the jury about it? [107]

A. I guess it was on the 15th that I decided that he could be a candidate for surgery. With surgery they get along a lot better but Mr. Pehrson kind of wanted Doctor Adams to look at him; he wanted Doctor Adams to look at him before he went ahead; maybe he was a little bit doubtful about it or something, and then he decided to go ahead and Doctor Adams came in on the morning of the 19th, and on the morning of the 19th Dr. Adams and myself and Doctor Weholdt operated. The operation consisted of what they call a Smith-Peterson operation of the thigh, that is, the hip bone is exposed indirectly—that is, it is all done under X-ray, you

(Testimony of Dr. Francis Brinck.)

can't see most of the time what you are doing; you work for awhile and then you X-ray. A nail about four inches long is driven up into the head of the hip bone just below the socket and to that is attached a side-plate with a screw and then screws are put through the side-plate and then a wire was put through another fragment to hold it together. At the same time this was done another operation was carried out on his collarbone in which an incision was made over the fracture and the fracture brought back and held together with stainless steel wire in the form of a figure eight loop. Mr. Pehrson was returned to bed following surgery and left in traction and the traction was removed about the 4th of October, 1952, allowing him to sit up; we don't like to see these people who [108] are hurt so badly stay on their back too long, or they may get pneumonia and die on you.

Q. Handing you this Exhibit Fourteen, I will ask you what that represents?

A. Well, this is actually a wax model of a hip bone with a nail, we call it a nail, which is this, you can only see the end of it here, it goes from here right up to this end (indicating); here you see the side-plate and here is the screw connecting onto the side-plate; this holds the side-plate onto the nail right here (indicating) and the screws hold this on here (indicating). This is not a replica of Mr. Pehrson's hip, this is a wax model and was made many years ago for a medical demonstration that I put on and I gave it to Mr. Pehrson for a souvenir

(Testimony of Dr. Francis Brinck.)

to use as a paper weight. This red line (indicating) does not represent the fracture that Mr. Pehrson had. He had a fracture about like this (indicating) and another fracture down here as well, and that is drawn in blue. I drew those in there for him one day while he was in the hospital. Mr. Pehrson's side-plate is a five-hole side-plate, and this is a three-hole plate; his is about this long (indicating). In addition, he had a piece of wire because this big knob that you see here was broken off and a wire was placed around this and back into the main bone to hold it together. [109]

Q. Do you have an X-ray with you that shows this bone after you operated?

A. The one I have here was taken some time afterward; it was taken on the 2nd of July, 1953.

Q. Handing you Plaintiff's Exhibit Number Fifteen, will you just state what that is and when the picture was taken?

A. This is an anterior-posterior X-ray of the hip, taken on the 2nd of July, 1953. Anterior-posterior means that it is an X-ray taken from front to back, just like you are looking at a person and it shows the nail, the screws and the side-plate and the wire in place with the fractures healing.

The Court: Have you any objections to this being admitted?

Mr. MacGillivray: No; none at all.

The Court: It may be admitted.

Q. Doctor, do you have a sample of some of those wires put into him?

(Testimony of Dr. Francis Brinck.)

A. Yes; I have a sample here.

Q. Will you tell just what you did with those wires? We will have them marked for identification.

A. This is what they call a Kirschner wire, and this was put through the lower end of the tibia, this way, and [110] right through here. This is a sample of stainless steel wire and it is the wire that was used in the collarbone and in the hip.

Mr. Towles: I would like to have these marked.

The Court: Do you have any objections to these exhibits being admitted?

Mr. MacGillivray: No; no objection.

The Court: They may be admitted. Those are Exhibits Number Fifteen and Sixteen. It seems there was a mix-up on the other exhibit, I thought it was Number Fifteen.

The Clerk: These are numbered fifteen and sixteen—no, your Honor, these are sixteen and seventeen; fifteen was the X-ray. Sixteen is the straight wire; seventeen is the roll.

Q. Similar wires were put into his shoulder blade or collarbone? A. Yes, sir.

Q. And it is still in there? A. Yes, sir.

Q. Can you feel that when you put your hand on his collarbone?

A. You can feel something there, whether it is the end of the wire or not, I don't know. [111]

Q. It has never been taken out? A. No.

Q. And did Doctor Adams do that part of the operation?

(Testimony of Dr. Francis Brinek.)

A. I think he did; I think I did the hip and he did the shoulder.

Q. Can you feel this plate and bolt and things inside the hipbone, can you feel those?

A. You can feel the plate and the nut that goes on the end, the nail, the Smith-Peterson nail is buried and all you can see of that is the very end, a little of the end.

Q. Is this operation something that has come in in recent years?

A. About 1936 or 1937, I believe.

Q. And what do you call it?

A. A Smith-Peterson nailing operation.

Q. How successful has it been, Doctor?

A. Well, it served its purpose; it gets them active again; otherwise, these people would have to be flat on their backs until they all healed and many people will not tolerate that.

Q. Finally Mr. Pehrson got on his feet, did he, or did he sit up in a chair?

A. We get them in a wheelchair or a chair and then we get them in a walker which is a frame with casters on it to [112] give them support, and finally we give them crutches and then a cane.

Q. Can you tell when a patient is suffering pain?

A. I think in some cases you can.

Q. Can you tell in Mr. Pehrson's case?

A. Yes; I could.

Q. Did he suffer? A. He did have pain.

Q. Was it severe, or could you tell?

A. Yes; he had severe pain.

(Testimony of Dr. Francis Brinck.)

Q. How long has he been under the care of you and Doctor Adams?

A. The last time I saw him for his hip was the 2nd of October, 1953, and then I saw him again later on but it does not state here the date and I saw him this summer.

Q. Did you examine him just the other day or last night, or some time recently?

A. I examined him last night.

Q. What was the result of your examination last night?

A. I examined the left shoulder and the right lower extremity. The left shoulder shows a scar three and a half inches over the collarbone; under the scar was a sharp mass or projection. I examined his shoulder for motion and I found the motion in the shoulder was good.

Q. Does he have any pain in that shoulder on motion? [113]

A. I cannot tell.

Q. Is it affected by the weather?

A. He tells me that it is and early in the morning, the first thing in the morning, he has to kind of get it going. I measured the arm below and above the elbow to see if there was any wasting away of the muscle and I found there was not. Then I examined the leg, I found there was a scar over the right hip seven inches in length. The right leg is one inch shorter by actual measurement and by apparent measurement it is two inches shorter—truly, this is a very technical point but by actual measurement, as an engineer would measure it, it is one inch

(Testimony of Dr. Francis Brinck.)

short, and as he uses it, it is two inches short. That is kind of hard to explain and I will admit that it took me a number of years to understand it. I found that he had a one-inch wasting of the right thigh which shows that he is not using it as much as the left and, therefore, the muscles would waste. The right calf was slightly smaller than the left calf but not enough to accurately give the distance, but there is a slight amount of difference. The next thing I did was to examine the range of motion in the knees and the ankles, which were approximately the same, and then I examined the range of motion of the hips to compare the right hip to the left hip to see if the one that had been broken had as good a motion as the one that had not been broken. The hip that had [114] been broken is held slightly in toward the body, that is, a little bit upwardly rotated when he lies naturally, it points out a little bit. The figures that I came up with was that abduction, which is this motion—that he has a limitation of motion of abduction of ten degrees; he had thirty degrees of motion of this on the left and only twenty degrees on the right. Adduction, which is this one, was the same, that is, the bringing of the legs in, and in rolling the legs in and out it is found that on the right side he can roll out five degrees while on the left side he can roll out about ten degrees. Let me make a correction on that, I should say, that is rolling it in. On the good leg, rolling it out, he could roll it out about thirty degrees, that is on the left, and on the right he could roll it about twenty.

(Testimony of Dr. Francis Brinck.)

So that he had some limitation of motion in rolling it in and rolling it out. He has some limitation in pulling it out this way but there is none in this motion (indicating).

Q. How does this affect his ability to walk, and to do the work that he has been doing as an architect?

A. As far as ability to walk is concerned, he has pain in it, it is short and there is a limitation of motion and he does have pain.

Q. Is he able to climb around the construction of buildings at the present time, or will he be in the future?

A. No; not to any great extent, he might be able to climb [115] up one ladder, but he cannot be running up and down ladders; he has a very painful hip.

Q. Will that continue in the future, Doctor?

A. That is permanent.

Q. Your opinion is that these injuries are permanent? A. Yes.

Q. And will last as long as he lives?

A. Yes.

Mr. Towles: You may take the witness.

Cross-Examination

By Mr. MacGillivray:

Q. Doctor Brinck, you first put in these Kirschner wires above the knee and above the ankle, is that right? A. Yes, sir.

(Testimony of Dr. Francis Brinck.)

Q. The purpose of those was to assist in traction? A. Yes.

Q. Sometimes you treat these broken bones by traction and other times by open operation?

A. Yes, sir.

Q. The reason you do the open operation is that when you do use traction you pull the bone back into normal position as best you can and leave it in that position until normal healing takes place?

A. Yes.

Q. And that takes some period of time? [116]

A. That takes three or four months, and they are flat on their back during that time.

Q. And the benefit of the open reduction of a fracture, that operation is to nail the fracture together or the fractured part together, instead of waiting to heal by the use of traction and the patient gets the use of it quicker, is that right, Doctor?

A. All of this hardware here doesn't make it heal any faster; all it does is hold it together, the parts together while it does heal. There is no strength to this material; it looks nice and strong, and everything like that, but it has no strength, that is why we are so careful because any false move of any kind—a slip or a sudden jerk will tear all that stuff out and it is just to hold it in place while it does heal.

Q. If you don't use the open reduction, then the patient is bedridden for some time? A. Yes.

Q. If you do use open reduction they can get

(Testimony of Dr. Francis Brinck.)

up in a wheelchair or get around, otherwise they don't?

A. Yes; that is right; that is the purpose of it.

Q. And that is a commonly accepted operation today?

A. It is.

Q. And you orthopedics do a number of them?

A. Yes.

Q. You do a number of those yourself? [117]

A. Yes.

Q. And Doctor Adams took care of the shoulder?

A. Yes; we both worked together, but I am certain that he did the shoulder and I did the hip and then afterwards we both took care of him.

Q. As I understand, at the present time, the motion in the shoulder is good, there is no atrophy of the muscle or the arm or anything?

A. That is right.

Q. In other words, Doctor Adams got a very good result insofar as the shoulder is concerned?

A. Excellent.

Q. And insofar as the right leg and right hip is concerned he has some limitation of motion on the right side as compared to the left?

A. Yes.

Q. There is some limitation in abduction movement and in rotation?

A. Yes.

Q. And the right leg is one inch shorter than the left?

A. That is correct.

Q. And I presume that shortness is what causes the limp?

A. That is one of the factors, probably the biggest factor.

(Testimony of Dr. Francis Brinck.)

Q. Do you ever build the shoe up in a case like that, or has it been tried?

A. I don't think it would help—the body will tolerate one inch. [118]

Q. What was that, Doctor?

A. I say the body will tolerate one inch.

Q. He does have some discomfort if he walks for any distance?

A. I know he does. I have seen him on the street and he has quite a difficult time in getting around.

Q. He does do quite a bit of walking around on the streets in Spokane?

A. Well, I see him on the streets sometimes, yes.

Q. Insofar as his work is concerned, you would not advise his climbing ladders all of the time?

A. I don't know how to answer that. I cannot advise him because I think it would be too painful.

Q. Insofar as the extent of the fracture is concerned, I take it that this Smith-Peterson operation that you did, you had a good result insofar as that is concerned?

A. Yes; it is short and it was slow in healing, but inasmuch as it was so badly comminuted I would say that it is a fine result. Twenty-five per cent of them don't heal at all.

Q. They don't heal at all?

A. They never heal. He went on to a union and I would say that it is a very fair result.

Q. Would you say that the hip is surgically healed now?

A. The fracture is surgically healed; yes, sir.

(Testimony of Dr. Francis Brinck.)

Q. That is both insofar as the shoulder and the hip is concerned? [119] A. Yes, sir.

Mr. MacGillivray: That's all.

Redirect Examination

By Mr. Towles:

Q. Is there anything further that you could do for this patient that you know of, Doctor?

A. Well, I wanted to go in and cut the muscles in the hip with the idea that it would maybe increase range of motion, but after consulting with my partner he didn't think that the amount of benefit derived from the surgery would be worth while, and, so, therefore, I didn't pursue the subject any further, otherwise, as far as treatment goes, I don't know of anything else to do.

Q. Would it be necessary, or would you advise the removal of this plate and these screws from this bone?

A. The only time that those are removed is when the patient complains that he can feel them, sometimes they will tell you that at night when they lie on that side, it is like lying on a rock. After all, part of this hardware is between the bone and the skin and particularly in thin people they will complain about it, otherwise they are not removed ordinarily.

Q. Would you advise removing them in this case? A. Not in this case.

Q. When you speak of an open reduction, what do you mean by that? [120]

(Testimony of Dr. Francis Brinck.)

A. An open reduction is when you cut down to the fracture and put them together with tools.

Q. In cutting down to the fracture you have to go right through the flesh, the muscles, the nerves, and everything, don't you? A. Yes.

Q. And you lay all of them to one side, and then start in to scraping the bone, do you?

A. No; you don't scrape the bone; you try to line everything up the way that it should be and put it together with metal.

Mr. Towles: That is all.

Recross-Examination

By Mr. MacGillivray:

Q. By the way, Doctor, these Kirschner wires were taken out after you decided on the surgery?

A. No; they were taken out in October and the surgery was in September.

Q. But they were taken out.

Mr. MacGillivray: That's all.

Mr. Towles: That is all.

The Court: Doctor, I assume that you may be excused so that you can get back to your own work.

KATHRYN M. SHEEHAN

called as a witness by the Plaintiff, after [121] being first duly sworn, testifies as follows:

Direct Examination

By Mr. James G. Towles:

Q. Mrs. Sheehan, will you state your age and your occupation?

A. I am a private duty nurse and I am thirty-seven.

Q. And what has been your experience in the nursing field, how long have you been in that field?

Mr. MacGillivray: I will admit her qualifications as a registered nurse.

The Court: Her qualifications as a registered nurse and her ability and all of that are admitted.

Q. How long have you been a nurse?

A. I went into training twenty years ago.

Q. And you have been in that continuously?

A. Yes, sir.

Q. Are you acquainted with the plaintiff in this case, Mr. Pehrson? A. Yes, sir.

Q. And will you relate what your relationship has been to Mr. Pehrson?

A. I was called by the Nurses' Professional Registry to care for Mr. Pehrson on September 19th and I went over on the morning of the 20th of September.

Q. Was that immediately after the [122] operation? A. Yes, it was.

Q. In your experience as a nurse you have fre-

(Testimony of Kathryn M. Sheehan.)

quently taken care of people that had serious injuries or were seriously ill?

A. Yes, sir; many of them.

Q. Have you had occasion to observe people under conditions of suffering?

A. Yes, sir; many times.

Q. Will you state your experience whether Mr. Pehrson was suffering in the hospital?

A. He had a great deal of discomfort.

Q. Will you explain that?

A. Well, I went to be with him the day after surgery and he was having a great deal of pain due to the position that he was in; he was flat on his back and was helpless and he had pain in the operative procedure.

Q. How long did that painful condition continue?

A. Well, he was uncomfortable all of the time that he was in the hospital, but he did receive opiates for the first week.

Q. That was the first week that you attended him? A. Yes, sir.

Q. And after the first week, was it possible that he could sleep without opiates?

A. Well, he tried very hard; he was a good patient. [123]

Q. Did he complain about pain?

A. He had a great deal of pain.

Q. Did he complain about it to you?

A. Yes; I knew that he was having pain.

(Testimony of Kathryn M. Sheehan.)

Q. Will you state how long this pain continued while you took care of him?

A. He had a great deal of pain at first, and as time went on it was while he was moving, getting up and one thing and another. The pain was continuous, however, all of the time that I took care of him.

Q. Did you take care of him until he left the hospital? A. Yes, sir; I did.

Q. Do you know when he left the hospital?

A. I was with him until the 8th of November.

Q. And after that time you had no contact with him?

A. I had no contact with Mr. Pehrson after that.

Mr. Towles: I think that's all.

Cross-Examination

By Mr. MacGillivray:

Q. Mr. Pehrson was a pretty good patient?

A. He was very good.

Mr. MacGillivray: That's all.

Mr. Towles: That's all.

MRS. BESS PEHRSON

called as a witness by the plaintiff, after being [124]
first duly sworn, testifies as follows:

Direct Examination

By Mr. Funkhouser:

Q. Will you please state your name?

A. Bess Pehrson.

(Testimony of Mrs. Bess Pherson.)

Q. Are you the wife of G. A. Pehrson, the plaintiff here? A. Yes, I am.

Q. You live in Spokane? A. Yes, sir.

Q. How long have you been married?

A. Thirty-eight years.

Q. Any children?

A. One daughter, and we have two grandchildren.

Q. Prior to this accident in 1952, Mr. Pehrson was what we would call at least an average man in good health? A. Yes, he was.

Q. Did he enjoy out-of-door life, hunting and fishing?

A. Yes; he always went hunting and fishing.

Q. And he got considerable enjoyment in the great out-of-doors? A. Oh, yes; he did.

Q. You were with him how much of the time in the hospital?

A. As much as I could be there. I was there in the morning and then I left to go home and then I went back when Mrs. Sheehan would leave and I would take over again, I stayed there until 10:00 o'clock at night. [125]

Q. You heard the nurse speak of his suffering—when he went home, who had charge of him?

A. I did.

Q. And he went home, did his suffering continue?

A. Yes, sir; it did; I took care of him and I know about that. I had to lift him in and out of the walker every day and that wasn't very easy. I gave

(Testimony of Mrs. Bess Pherson.)

him his bath and I helped him as much as I could.

Q. You heard the doctor say that a bolt and this piece of metal is still in his hip?

A. Yes; I did.

Q. And it can be felt, can it?

A. I don't know; I never felt it, but I guess so.

Q. I mean, it is obvious?

A. I suppose he can feel it; he says that it hurts.

Q. Can you tell us about the suffering that he endured when he went home?

A. He suffered a great deal. He wouldn't take any opiate and I couldn't give him anything but I tried to make him as comfortable as I could in bed and I helped to turn him around.

Q. Does it still bother him?

A. Yes, it does; especially on rainy days it aches; he says that it does and I can tell because he is so lame.

Mr. Funkhouser: That is all. [126]

Cross-Examination

By Mr. MacGillivray:

Q. Mrs. Pehrson, in the months before Mr. Pehrson had this accident, did you go with him on the inspection trips?

A. Yes; I used to go with him all the time and help drive the car.

Q. Did you, particularly in the month before this accident happened, drive him around?

A. Before it happened?

(Testimony of Mrs. Bess Pherson.)

Q. Yes; that is, between the 12th of August and the 12th of September?

A. Not just that month; I always went with him on his trips.

Q. Wasn't he in the hospital about the 12th of August with a serious infection?

A. He had the flu, I guess, for a couple of days.

Q. He was in the hospital for about four days?

A. Three, I think.

Q. Other than that, he had been in good health?

A. Yes, he had; he has always been healthy.

Q. Does he drive a car back and forth to the office? A. I do most of the driving now.

Q. Doesn't he drive the car quite a bit?

A. Not very much. I drive him to the office and go and get him at night.

Q. Is that just since the accident?

A. Yes. [127]

Q. Didn't he drive the car up here yesterday?

A. Yes; he can drive but I try to help him all that I can.

Mr. MacGillivray: That is all, I believe.

Mr. Towles: The Plaintiff rests, your Honor.

The Court: Ladies and Gentlemen of the Jury, you may be excused until 10:00 o'clock tomorrow morning and you may retire at this time.

Mr. MacGillivray: If the Court please, I would suggest that before Mr. Towles announces that he rests, that there are a couple of exhibits, one that has not been admitted, and one that I think was

admitted with reservation or that the Court took the ruling under advisement.

The Court: I will take judicial notice of this book, and I will not admit it in evidence. I will take judicial notice to it as a part of the law of this state and I will give it to Counsel so that they can point out to me any part of it that they think is material to this case. You may take the book with you tonight and make me a little memorandum of the sections of the book that you think are material in this case.

Mr. Towles: I think it is all contained in one of the instructions that I have [128] handed to your Honor.

The Court: Very well, if it is all in that instruction, that is the part of it that you claim is material, if that is right I will take that as your memorandum of what you deem material. The objection to the offer of Exhibit Number Three will be sustained; the other I am sure was admitted. This model of a bone, that has not been **admitted**.

Mr. Funkhouser: We would like to have that admitted.

The Court: That was Number Fourteen, and that may be admitted at this time.

Mr. Towles: Now, then, I think Exhibit Number Seven, which was some wire——

The Court: There was no objection to that; it may be admitted.

Mr. Towles: Plaintiff's Exhibit Fourteen, which is the bone——

The Court: I thought that was the one I just spoke of.

Mr. MacGillivray: That is right, but we do have an objection to that. The Doctor has testified that it was not a replica of Mr. Pehrson's hip.

The Court: That is right; if there is an objection, that objection will be sustained because I recall now that the doctor did testify that it [129] wasn't a likeness of the bone involved here.

The Court: There were some exhibits that were admitted subject to your motion to strike.

Judge Hawkins: We have no objection to those exhibits.

The Court: Very well, then they may be admitted if there is any doubt about their admission. The checks and the hospital bills have also been admitted. Are those the ones you had in mind, Judge Hawkins?

Judge Hawkins: That is right.

The Court: This Exhibit Number Nine, which was a contract, I ruled on that and it was not admitted, because it is admitted by the defendant that there was a contract and that Mr. Pehrson was rightfully there. I think that takes care of everything up to this point.

Mr. MacGillivray: Comes now the defendant at the close of the plaintiff's case, the plaintiff having rested, and challenges the sufficiency of the plaintiff's evidence to sustain any verdict against the defendant and moves the court for a voluntary nonsuit and requests the court to instruct the jury to

bring in [130] a verdict in favor of the defendant.
That is my motion.

(Remarks by counsel not reported.)

The Court: I will take this under advisement and rule on the motion tomorrow at 10:00 o'clock. At this time we will recess until 10:00 o'clock tomorrow morning.

October 22, 1954—10:00 A.M.

The Court: I think perhaps it might be a waste of time to proceed further in this case, but I don't want to give a hasty decision on the matter, and as the rules provide that I can take this up again at the close of the evidence, I will overrule your motion at this time.

Mr. Towles: I would request that the plaintiff be permitted to reopen its case for the purpose of having a witness, Mr. Donald Hurst, who was mentioned by Mr. Pehrson in his testimony. I would ask that he be permitted to testify here. Mr. Hurst has just returned from Arizona and I phoned him at Cocolalla and he said that he would come down to court this morning and I would now ask that we be permitted to reopen and call Mr. Hurst.

The Court: I will not [131] reopen the case at this time. Mr. Bailiff, you may call the jury.

(The following in the presence of the jury.)

(Opening statement by Mr. MacGillivray.)

RICHARD VAN SLIKE

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. MacGillivray:

Q. What is your full name?

A. Richard VanSlike.

Q. Where do you reside? A. Spokane.

Q. And you are employed by whom?

A. The DeLong Plumbing Company.

Q. Is that a plumbing contracting concern in Spokane? A. Yes, sir.

Q. How long have you worked for them?

A. Since 1945.

Q. What type of work did you do?

A. Plumbing of all sorts.

Q. Did you have any connection with the construction of the grade school at Cocolalla, Idaho, during the year 1952?

A. We had the plumbing and heating.

Q. By that, do I understand that the DeLong Plumbing Company sub-contracted under the C. B. Lauch Construction [132] to do the heating and plumbing? A. Yes.

Q. You were not employed by the Lauch Construction Company? A. No, sir.

Q. You were working for the DeLong Plumbing Company? A. Yes, sir.

Q. Were you in charge of that work for the DeLong Plumbing Company? A. Yes.

(Testimony of Richard VanSlike.)

Q. What did your work consist of during the course of the construction of that school building?

A. Well, all of the plumbing from the ground-work up through the finish.

Q. Did the work entail any work on the roof of the building itself? A. Yes.

Q. What type of work was done on the roof by you?

A. We had a roof drain, two of them, and we also had all of the vents for the plumbing fixtures.

Q. Were you familiar, during the course of the construction, prior to September 12, 1952, with a ladder as a means of access to the roof at the front of the building? A. Yes, sir.

Q. Had you used that ladder?

A. Yes, sir; many times.

Q. For what purpose? [133]

A. Getting to the roof.

Q. Had you carried material up that ladder?

A. Yes, sir; sometimes quite heavy materials.

Q. Now, will you please speak up and just tell the jury what kind of material you would carry up that ladder and how you would get the material up there on the roof?

A. I have carried different types of wrenches and different sizes and different sized pipes to the roof for the running of the vent through and I have rain leaders from the gym, the highest portion of the roof, to feed in through the top and to get the material up there I would carry it on my shoulder and some of the heavier I would lay out on the

(Testimony of Richard VanSlike.)

awning up there and then get up on the awning and put it over on the roof.

Q. After you got the material on the awning, how would you get your body from the ladder to the canopy itself?

A. I would just walk up the ladder, step over on the canopy and throw my leg over the wall.

Q. Did the ladder extend up above the canopy?

A. Well, I would say that it hit about half way up the parapet wall.

Q. How far above the top of the canopy did the top of the ladder extend?

A. I would say, roughly, eighteen inches.

Q. Did you have any difficulty with that ladder in getting [134] off the ladder on the ledge on the canopy and over on the roof of the building?

A. No; I had no difficulty.

Q. Was that ladder solidly constructed?

A. Yes, sir.

Q. And was that ladder—strike that, please—before using that ladder and starting up, whether you were carrying material or not, what precaution did you take to see that the ladder was safe?

A. Well, I always put my foot on the bottom rung and pulled the ladder to see if it was sitting solid and then I would go on up.

Q. To see if it was setting solidly at the bottom?

A. Well, sometimes it had been setting there for a week.

Q. Before using it, you would do that to see if it were solid at the bottom?

A. Yes.

(Testimony of Richard VanSlike.)

Q. And you would see if it was fixed solidly to the wall at the top, or, rather, against the wall?

A. Yes, sir.

Q. Is that a custom that you follow in all construction work? A. Yes, sir.

Q. Were you present on the construction site the date that Mr. Pehrson was injured which was on September 12th? [135] A. Yes, sir.

Q. Did you see him fall? A. Yes, sir.

Q. Where were you, Mr. VanSlike, when Mr. Pehrson fell?

A. I was on the bottom step, coming out of the door.

Q. If you will step down here and show the jury where you were, please, at the time Mr. Pehrson fell? This is the canopy that you were speaking about, this is the brick wall here and this is the opening of the front door.

A. I was at this front door, the cement is carried out to here, about like that (indicating).

Q. Will you point out to the jury just what your position was when Mr. Pehrson fell?

A. I was standing about here on the bottom of the step.

Q. With relation to where you were standing, where did Mr. Pehrson fall?

A. In Front of me—one step more and he would have lit on top of me.

Q. Where was the ladder at the time?

A. It was leaning up against the building.

(Testimony of Richard VanSlike.)

Q. Can you place it on the model, just where the ladder was?

A. The ladder was in that position (indicating).

Q. Mr. VanSlike, Mr. Pehrson's body came down then between the right side of the ladder and the west wall of the building? [136]

A. Yes; he lit right about where that pointer is.

Q. How far to the right of the ladder, looking toward the building?

A. Three or four feet over.

Q. After Mr. Pehrson fell to the ground, did you go over and check the ladder, or take a look at it?

A. No; I didn't.

Q. Was the ladder still standing? A. Yes.

Q. Was it still standing in a normal position, so far as you could see?

A. So far as I could see, yes, sir.

Q. As I understand it, you didn't see Mr. Pehrson's body as he started to fall, and you don't know whether he fell from the ladder or the ledge, or where?

A. I don't know exactly where he fell from.

Mr. MacGillivray: You may cross-examine.

Cross-Examination

By Mr. James G. Towles:

Q. On the day in question here, did you have any occasion to go outside of the building and to go around on the outside?

A. Our plumbing shed was on that side and to

(Testimony of Richard VanSlike.)

get in and out of the schoolhouse I would go out of that door and in it. [137]

Q. Did you go along on any other side other than the south side—this is the south side, is it not?

A. Yes; the south side.

Q. Did you go on the east, or the north, or the west, to your recollection?

A. Not to my recollection.

Q. Do you recall any other ladders being up against the roof of the building on the day in question?

A. No; not on that particular day; I don't know but there always were some others.

Q. Was that the ladder that was ordinarily used to get to the roof? A. Yes.

Q. Did a number of workmen use that ladder?

A. Oh, yes.

Q. You testified that the standard of that ladder reached approximately eighteen inches above the top of the canopy, is that correct? A. Yes.

Q. Under those circumstances, the top rung would be where in relation to the canopy?

A. I don't know exactly where it would be in relation to the canopy.

Q. Would it be about even with the top of the canopy? A. Yes; it could be. [138]

Q. Is it the ordinary thing that a ladder would only reach with the top rung to the point you were going to climb—would that be the ordinary way that a ladder would be placed?

A. Well, there are just so many rungs on the ladder and it is used for many purposes.

(Testimony of Richard VanSlike.)

Q. I guess you don't understand my question. Is it ordinary that a ladder of this length would be used to reach a point such as the top of the canopy?

A. Yes.

Q. Isn't it more ordinarily the case that a ladder would be much longer to reach that point?

A. Not ordinarily, no.

Q. When you reached the top of the ladder you practically were on the top rung, is that right?

A. I think there was a couple more rungs to go when I climbed up the ladder and stepped on the canopy.

Q. Aren't the rungs on the ladder about fourteen inches from the top of the standard? A. Yes.

Q. And if it was eighteen inches above the top of the canopy, then the top rung would be about even with the top of the canopy, isn't that right?

A. There was a rung higher than the top of the canopy.

Q. It could not have been much higher, [139] could it?

Judge Hawkins: We object to that as argumentative.

Q. I will ask this: Did you notice any rubbish or broken concrete blocks about the bottom of this ladder, on the day in question?

A. The usual amount of junk lay around.

Q. Do you recall whether this waste material had been there for any considerable period of time, or all during the construction, or was it just that day, or what?

(Testimony of Richard VanSlike.)

A. I believe that they had cleaned up the mess that the bricklayers had made.

Q. Had this particular rubbish been there very long, to your recollection?

A. Not to my recollection.

Mr. Towles: That's all.

Redirect Examination

By Mr. MacGillivray:

Q. Mr. VanSlike, as I understand it, the method that you used was that you would step from the ladder onto the canopy, it was a stepping operation there? A. Yes.

Q. And from the canopy you would throw your leg over the parapet wall and over onto the roof?

A. Yes, sir.

Mr. MacGillivray: That is all. [140]

Recross-Examination

By Mr. Towles:

Q. Did you walk all the way up to the top rung, that is, the one nearest the top of the ladder when you climbed up?

A. I would go to the one nearest the top of the canopy—I believe there was another one up further. I would walk up and step over on the ledge and on I would go.

Q. You stepped from the ladder onto the ledge?

A. Yes.

Mr. Towles: That's all.

Mr. MacGillivray: That is all.

LYLE RICHARDSON

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. MacGillivray:

Q. Where do you live, Mr. Richardson?

A. Boise, Idaho.

Q. And what is your occupation?

A. I am a carpenter by trade.

Q. A carpenter?

A. Yes. I am a superintendent now. I follow the construction building game.

Q. You are superintendent for whom?

A. The C. B. Lauch Construction [141] Company.

Q. How long have you been with the C. B. Lauch Construction Company? A. Since 1938.

Q. What type of construction does the C. B. Lauch Construction Company generally do?

A. General construction work, houses, schools, dwelling units, apartment units, hospitals, government installations, utility work such as sewer and water systems, sewage disposal plants, and all work of that nature.

Q. Did the C. B. Lauch Construction Company take a contract for the Bonner School District Number 82 some time in the spring of 1952?

A. That is correct.

Q. Did that contract cover the construction of the Cocolalla School, and did it cover anything else?

(Testimony of Lyle Richardson.)

A. The Cocolalla School and the Pack River School.

Q. Do you remember when you started construction on the Cocolalla School?

A. I don't remember the exact date, but I think probably the first part of May.

The Court: I think at this time I will excuse the jury for just a few minutes.

(In the absence of the Jury.)

The Court: In view of the Motion heretofore made, I neglected one matter that I intended to take care of, that is, I am striking from the [142] complaint any allegation of negligence on account of the accumulation of waste material and rubbish, particularly in the area and about the base of the ladder. There is no evidence to show that this accumulation had not been properly handled by the contractor. In other words, there is no evidence to show that it was there for any length of time or that anyone had any knowledge of its remaining there for any length of time at all. Mr. Bailiff, you may recall the jury.

(The following in the presence of the jury.)

The Court: Ladies and Gentlemen of the Jury, I have stricken from the Complaint here any allegation of negligence which alleges that the premises were not kept free of waste material and rubbish. There is no evidence submitted here to show that any accumulation of rubbish had been allowed

(Testimony of Lyle Richardson.)

to remain on the premises for any length of time. In other words, there is no evidence to show that the rubbish had not been promptly and properly removed after its accumulation, and there is no evidence to show that this had been here for any length of time except just the ordinary length of time that it would accumulate, and that leaves the matter entirely in connection with the ladder. I just wanted to advise counsel and the jury that I had taken that out of the pleadings. [143]

Q. Mr. Richardson, was the Cocolalla and the Pack River schools under course of construction at the same time? A. Yes; they were.

Q. And you were in charge for the C. B. Lauch Construction Company of the construction of both of those schools? A. Yes; I was.

Q. Was Mr. G. A. Pehrson the architect on both schools? A. Yes; he was.

Q. And were both of those schools similar in construction? A. They were.

Q. Now, on this question of grade to the south of the school building. On the plans and specification prepared by Mr. Pehrson there was a finish grade line provided as shown on the model which you see here? A. That is correct.

Q. When was that grading done with respect to September 12, 1952?

A. Well, the preliminary grading was done previous to any excavation. The original ground was approximately three feet lower, or even more, on the south side to what it was on the north side. In

(Testimony of Lyle Richardson.)

fact, it could have been as much as five feet, I don't recall. But, with power equipment, I made a cut on the north and a fill on the south side and that fill was extended out ten feet approximately beyond the building line. The reason for extending out was so that I could do the excavation with power [144] equipment and have the equipment setting on level ground at the time of the excavation so that the dragline would not be setting on a hillside. So the fill was made beyond the excavation for the footings so that the tires of the dragline, it was a truck-mounted dragline—so that it would operate on level ground.

Q. And at what point in the construction was that filling and grading done?

A. That was done probably in the first week of operation.

Q. And what was the grade line with reference to the finish line as shown on the model prepared by Mr. Pehrson, that is, on September 12, 1952?

A. The grade would vary throughout the south side from six inches from the top of the brick down to fourteen inches at the most in various locations.

Q. You mean, from the bottom of the brickwork?

A. Yes; from the bottom of the brickwork, which was the same as the finish floor.

Q. During the course of construction, were some ladders made there on the job by carpenters?

A. Yes.

Q. How many?

(Testimony of Lyle Richardson.)

A. Well, I don't know, but I imagine that we built as many, well, I would say eight at least.

Q. And what type of ladder? [145]

A. Well, they were all constructed with two-by-fours as the standards, and one-by-fours as the cleats.

Q. Were they different sizes?

A. Yes; they were different lengths and some different widths?

Q. How many ladders were used there as a means of gaining access to the roof?

A. Well, it depended on the amount of work and the number of men or workers, if the roofers were roofing they probably had one ladder and if they were doing cement finishing on the bond beam they would probably have one that they used, and if we were doing any work on the slashing, they would also use a ladder.

Q. Was there ordinarily one they kept on the north side of the building as a means of access to the roof?

A. Yes; that stayed there practically all of the time but sometimes it would be laying on the ground. Some of the workmen would come along and if they found that any particular ladder would be in their way, they would just lay it down and then some other man would come along and put it back up.

Q. And was there ordinarily a ladder kept on the west side as a means of access to the roof?

A. Yes, there was; that ladder on the west side of the building, a good amount of the time, was lay-

(Testimony of Lyle Richardson.)

ing down. We were a little crowded for room on the west side of the building. Whenever we would run a truck through there the [146] bottom end of that ladder would extend far enough out so that we would hook it with the truck and many times that ladder was laying down, but it was on the west side practically all of the time, it was either in one position or the other, it was up or laying on the ground.

Q. Mr. Richardson, do you recall a sixteen-foot ladder that was used as a means of access to the canopy and then to the roof on the south side of the building?

A. Yes, sir; I do.

Q. That ladder was constructed of what?

A. Two-by-four standards with one-by-four cleats.

Q. The two-by-four standards were sixteen feet long?

A. I believe they were, yes.

Q. And one-by-four rungs placed at what distance?

A. If I remember right the spacing on those ladders were fourteen inches from the top of one cleat to the top of the other—twelve-inch centers.

Q. And was that ladder solidly constructed?

A. In my opinion it was.

Q. During the progress of that job did you ever have any difficulty or any defect appear in that ladder itself?

A. Not to my knowledge.

Q. Referring particularly to that ladder on the south side, was it always in the same position or was it moved from spot to spot?

(Testimony of Lyle Richardson.)

A. It was moved from spot to spot; it was not always in the same position. [147]

Q. In what different positions would it be used as a means of access to that roof?

A. That was used on the face side of the canopy as well as leaning up against the building in the position Mr. Pehrson stated that it was in.

Q. And was that ladder built for use in that position on the south side of the building and adjacent to the front of the canopy?

A. No; I don't believe that it was. I think that it was a universal ladder, if it was built for any particular purpose it was built for the purpose of stoning the bond beam around the building—for access to and from the scaffold that was used and protruded down the wall from the top of the parapet wall and they used hangers and brackets that hung down from the parapet wall and they set planks on those and the workmen that stoned the bond beam used that ladder to get to and from that work, also to get to the top of the roof to move their brackets.

Q. When it was used as a means of access to the roof, either in front of the canopy or to the left, where did the top of the ladder extend with reference to the top of the canopy?

A. I cannot rightly state just the distance, but I think a person could walk up the ladder without any difficulty and still have hold of the two standards and step from [148] the ladder onto the canopy.

(Testimony of Lyle Richardson.)

Q. Now, then, had you ever used the ladder in getting up on the roof of the building from the canopy over the parapet wall?

A. Yes; I have.

Q. On how many occasions?

A. Well, at times probably as many as twenty times a day on some days and then others one or two times, maybe.

Q. And what method would you employ in getting on the ladder up to the canopy and over the parapet wall from the canopy?

A. I would walk up the ladder in the usual manner and step off on the canopy; it didn't seem to be any effort at all to maneuver from the ladder over to the canopy.

Q. Who else on the job, other than yourself, used that ladder?

A. Practically everyone that worked there. Laborers, roofers, plumbers, and I think just about everyone concerned with the construction work.

Q. Were any materials taken up to the roof by means of this ladder on the canopy and then over on the roof?

A. Yes; flashing—metal flashing, bridging, blocking and nails, in fact, all of the various materials that a person would or could carry in his arms, or a pail, that you would feel safe in going up the ladder with, [149] they were all taken up that way.

Q. How would the workmen carry materials? Would it be in one hand and use the other hand on the ladder?

(Testimony of Lyle Richardson.)

A. That would be the usual manner.

Q. And were buckets of mud carried up?

A. Well, not very much; maybe we would have a small amount of grout when we would put in our flashings or something like that, at those times we would probably carry a small amount of grout, maybe two and a half gallons in a five-gallon bucket would be taken up the ladder.

Q. How many times a day would that ladder be used by people there on the job?

A. I would only be making a rough guess, but I think I would be safe in putting the figure at about fifty times, or maybe more.

Q. That would be each and every day?

A. Yes.

Q. And it would be over what period of time, prior to September 12th had that ladder been used at that location and for that purpose, just approximately?

A. Well, the ladder was moved so much that it would be hard to say in that location and the time would vary, it would depend, of course, on where a person would want to use the ladder and where the person had used it last.

Q. In other words, the workmen would move the ladder to the desired point where they needed the ladder to reach a [150] certain point on the building? A. That is right.

Q. To your knowledge, prior to September 12th, had you or any workman had any difficulty in using that ladder in reaching the canopy and thereafter

(Testimony of Lyle Richardson.)

getting on the roof? A. Not to my knowledge.

Q. Before using a ladder, whether it is used in that location, either in front or at the side of the canopy or any other place, what precaution would be taken by yourself or any other workmen?

A. Well, I think it is second nature for anyone who has followed construction work, regardless of whether it is a ladder or what he is using, to use a certain measure of precaution in seeing where you are walking and see where you are going and to see that you don't step off in any hole, and if it is a ladder to see that the ladder is properly placed so that you don't endanger yourself.

Q. Is it the custom about a job like this to see that the ladder is solid at the bottom and solidly placed at the top?

A. Well, I usually pull back on the ladder, I expect it is on solid footing, but I usually pull the ladder back with one hand and let it fall back against the building before I proceed up the [151] ladder.

Q. And is that precaution taken by practically everyone in the building business?

A. I think it is. I think it is second nature to do that?

Q. Were you present when Mr. Pehrson fell?

A. No.

Q. Where were you?

A. I was in Spokane.

Q. Was that in connection with your work?

(Testimony of Lyle Richardson.)

A. Yes, I went to get some hardware that was to be used on construction of the building.

Q. And did you get back to the project before Mr. Pehrson was taken away?

A. I met the ambulance on the way back, and Mrs. Pehrson was driving either Mr. Pehrson's or Mrs. Pehrson's car. I recognized the car following the ambulance as I was going back to Cocolalla.

Q. When Mr. Pehrson came on the job, did you ordinarily go around with him on the inspection trips? A. Yes.

Q. And would you do the same at the Pack River School?

A. Yes, of course many times I didn't do that because I didn't go from one school to the other but if I was at the Pack River School when he came, I went with him.

Q. But you would go with him at times?

A. Yes. As I say, I never went from one school to the other with him. [152]

Mr. Towles: If the Court please, I feel that this testimony should be limited to the day the accident happened.

The Court: I will let him go ahead.

Q. Did you use the same type of ladders as a means of access to the upper portions of the building at the Pack River school job?

A. Yes, the same sort of ladders. I think probably all of the ladders were built at Cocolalla and taken over to the Pack River school.

(Testimony of Lyle Richardson.)

Q. And is it customary in construction work, particularly in construction of one-story buildings, to use ladders similar to those used on the Cocolalla school?

A. Yes, I think it is.

Mr. MacGillivray: You may examine.

Cross-Examination

By Mr. James G. Towles:

Q. Mr. Richardson, I believe that you testified that this ladder was originally built to reach some scaffolding on the side of the building?

A. I didn't say that it was originally built for that purpose. I said that it was originally used for that purpose.

Q. Using the pointer could you indicate to the jury, the [153] position of the scaffolding on the side of the wall when they were putting in this stoning that you talked about?

A. That scaffolding was hung from the top of the parapet wall down to that point there (indicating).

Q. And the top of the scaffolding would be even with the top of the bricks?

A. Somewhere in that neighborhood. It was used for the purpose of cleaning and checking the concrete.

Q. Do you know whether or not this ladder was correctly in position at the time of the accident?

A. I don't know that the ladder had any correct position. To my way of thinking it was in correct

(Testimony of Lyle Richardson.)

position regardless of where it was; it could be used anywhere on the building.

Q. But you don't know on the day in question because you were gone from the site?

A. That's right.

Q. Do you recall, Mr. Richardson, how long that ladder had been in this position before the accident?

A. No, I don't. It was a universal ladder and I don't recall where it was.

Q. You don't recall if it was used in any other place?

A. Yes, it was, definitely.

Q. Mr. Richardson, did you have any conversation at any time with any person in regard to this ladder, to your recollection? [154]

A. In what respect?

Q. As to whether the ladder was adequate?

A. I never did.

Q. You never had any conversation with any person about that to your recollection?

A. No, sir.

Mr. Towles: I think that's all.

Redirect Examination

By Mr. MacGillivray:

Q. Mr. Richardson, at any time during the course of this construction did Mr. Pehrson make any complaint to you about the use of the ladder in question?

A. No, sir.

Mr. MacGillivray: That's all.

Mr. Towles: That's all.

ALVIN SLENTZ

called as a witness by the defendant, after being first duly sworn, testifies as follows.

Direct Examination

By Mr. MacGillivray:

Q. What is your full name?

A. Alvin Slentz.

Q. Mr. Slentz, will you speak up so that the folks over there in the jury box can hear what you say? Where do you live? [155]

A. Spokane, Washington.

Q. By whom are you presently employed?

A. By Buscombe and Rau.

Q. Who are they?

A. General contractors.

Q. During the spring and summer of 1952, were you employed by the C. B. Lauch Construction Company of Boise, Idaho? A. I was.

Q. Were you during that time working at the Cocolalla school at Cocolalla, Idaho?

A. I was.

Q. What was your job on that project?

A. Cement mason.

Q. And what is the job of a cement mason?

A. Cement work, on this job grinding, patching, dressing the outside wall, window sills, foundation, and the parapet wall.

Q. Did your work entail working on the roof and the upper portion of the building?

(Testimony of Alvin Slentz.)

A. Yes, it did.

Q. Were you familiar with this ladder that we have been talking about that was used as a means of access on the south side of the canopy over the front entrance and over the parapet wall to the roof?

A. Yes.

Q. Did you use that ladder? [155-A]

A. Yes.

Q. For what purpose?

A. For getting up on the roof.

Q. Do you recall when the ladder was either on the side of the canopy or the front of it, where the top of the ladder extended with reference to the canopy itself?

A. Well, I believe that it was about two and a half feet above the top of the canopy.

Q. And what method would you use to reach the roof of the building in using that ladder at the front entrance on the south side?

A. I would go up the ladder and either hang onto the top of the ladder or get hold of the top of the parapet wall and step over on the canopy.

Q. Would you step or crawl over to the canopy?

A. I would step over.

Q. Did it reach high enough above the top of the canopy for you to step over from the ladder to the canopy?

A. Yes.

Q. Did you ever carry materials up that ladder?

(Testimony of Alvin Slentz.)

A. Not that I recall. Most of our material we took up with a rope.

Q. In other words, your material would be heavy cement material? A. That is right. [156]

Q. Do you know how many times you had used that ladder during the course of this work?

A. I imagine around ten times a day.

Q. Did you ever have any difficulty in going up or coming down that ladder? A. No, I didn't.

Q. Was the ladder solidly and firmly constructed? A. Yes, sir.

Q. Mr. Slentz, did you before using that ladder take any precaution to see whether it was solid on the bottom and solid at the top?

A. I do as a general rule, yes. I take that precaution on any ladder, and I think I did there.

Q. And that applies whether you were using this ladder or any other ladder? A. Yes.

Q. And you still do that? A. Yes.

Q. Do you recall whether you had used the ladder on the day that Mr. Pehrson had his fall?

A. I believe that we used it that morning.

Q. And by "we" who do you mean, whom are you referring to?

A. There were two cement masons on the job and we had some work on the cement wall there of the gym that we had not quite finished and we were going up there that morning and finishing [157] that.

(Testimony of Alvin Slentz.)

Q. How many times were you up and down the ladder that morning, you and your partner?

A. I would say approximately four or five times.

Q. And had either you or your partner placed the ladder that morning in the position that it was when Mr. Pehrson sustained his fall?

A. I think the ladder had been there in that position for some time previous to that.

Q. In using that ladder in that position four or five times before Mr. Pehrson used it, did you have any difficulty in using the ladder? A. No.

Q. Where were you when Mr. Pehrson fell?

A. I was working on the foundation to the left of the ladder.

Q. Were you working alone or with your partner? A. I was with my partner.

Q. What were you working on? Were you finishing the foundation? A. Yes.

Q. How far to the left of the ladder were you and your partner working?

A. I think it was around fifty or sixty feet.

Q. Did you see Mr. Pehrson fall?

A. No, I didn't.

Q. Did you, after he fell, go over to the position where he was? [158] A. Yes.

Q. Was Mr. Van Slike there when you got there? A. Yes.

Q. Do you recall where Mr. Pehrson was in reference to the ladder itself?

A. At the foot of the ladder.

(Testimony of Alvin Slentz.)

Q. On one side or the other of the ladder, do you recall, was he to the left or the right as you looked toward the ladder?

A. He was lying to the right of the ladder as I was facing it.

Q. Did you look at the ladder and check the ladder after you got over there, to see what might have caused Mr. Pehrson to fall?

A. I looked to see if there was anything broke or if it was out of position.

Q. And what did you see?

A. Well, it was apparently all right. It seemed to be in the same position that it was.

Q. The ladder was still standing and the top of the ladder was against the wall of the building?

A. Yes, sir.

Q. And was it apparently in any different position than it had been when you used it earlier that morning?

A. I don't believe that it was.

Q. And of course you don't know what caused Mr. Pehrson to [159] fall, or how he did fall?

A. No, I don't.

Q. Prior to the time of this fall, did Mr. Pehrson come to you or your partner and ask for any assistance in going up the ladder?

A. No, sir.

MR. MacGillivray: You may examine.

(Testimony of Alvin Slentz.)

Cross-Examination

By Mr. Therrett Towles:

Q. At this time when Mr. Pehrson got hurt and prior thereto that morning, were you working on the building?

A. We were working—there is a short concrete wall between the gymnasium—it is an extension of the gymnasium wall, and we were finishing that.

Q. Is that on the same side, the south side of the building, where the ladder is located? A. Yes.

Q. And how far from the place where the ladder is located?

A. Well, from there at the south side, I believe it is about twenty feet to where the concrete started.

Q. Twenty feet from where to this ladder—how many feet from this ladder were you working?

A. On the basement.

Q. My question is, how many feet from this ladder were you working on the south side of the building? [160]

A. I was working about fifty feet away.

Q. In which direction would that be from the ladder? A. That would be south.

Q. Will you take that model, and indicate where you were working, if you can?

Mr. MacGillivray: Mr. Slentz, you recognize the model there, and you see the canopy and the entrance and the window, the brickwork starts there

(Testimony of Alvin Slentz.)

(indicating). A. Yes.

Q. Mr. Towles wants to know and wants you to point out where you were working with reference to the ladder.

A. We were working on this foundation, about fifty feet from the bottom of the ladder.

Q. (By Mr. Towles): When did you go to work that morning?

A. About eight o'clock, it was at eight o'clock.

Q. And when did this accident happen?

A. I don't recall the time.

Q. Was it before lunch?

A. I think it was after lunch.

Q. You are not sure when the accident happened? A. No, I am not.

Q. You were doing some job of masonry, were you? A. No.

Q. What were you doing?

A. We were sacking concrete. [161]

Q. What do you mean by that?

A. Grinding and sacking, putting on mud in the holes and then we take a drier and wipe it off.

Q. You had a man with you? A. Yes.

Q. You had worked at that all morning?

A. Yes.

Q. Why did you go up this ladder that you testified to—you say that you went up the ladder; how did you do that if you were doing that work all of that morning?

(Testimony of Alvin Slentz.)

A. This wall extends over. It is a concrete wall there back about eight feet from this corner and we finished, we were finishing on that wall and had some work to do that morning. We finished that up and then we went up to finish this here. When we finished that we went back down and went to work over here (indicating).

Q. When did you get through your work on the high wall?

A. Well, I imagine it was about nine o'clock.

Q. You never went up this ladder after nine o'clock up to the time Mr. Pehrson fell?

A. I don't believe so.

Q. Do you know Mr. Hurst when you see him?

A. I believe I do.

Q. And did you know that he was on top of the building at the time Mr. Pehrson fell?

A. Yes. [162]

Q. So that he came down the ladder after Mr. Pehrson had fallen? A. Yes.

Q. And would it be customary for Mr. Hurst, before he came down, to put the ladder in place or in position? A. Yes.

Q. In other words, anyone coming down the ladder would see that it was in position?

A. Yes, I imagine so.

Q. He came down after Mr. Pherson had fallen?

A. Yes, sir.

Q. Did you check that ladder after Mr. Pehrson got hurt?

(Testimony of Alvin Slentz.)

A. No, I never checked it. I looked at it to see if I could see anything wrong with it.

Q. Was that after Mr. Hurst had come down from the top of the building? A. Yes, sir.

Mr. Towles: That's all.

Redirect Examination

By Mr. MacGillivray:

Q. You say that you assumed Mr. Hurst would put the ladder in position before he attempted to go down?

A. Yes, I believe that it would be natural for him to do that.

Q. What I am getting at is whether Mr. Hurst or anyone else would go up the ladder or down the ladder, before they [163] did that they would see it was in position? A. Yes.

Mr. MacGillivray: That's all.

Recross-Examination

By Mr. Towles:

Q. Naturally, Mr. Hurst would do that after Mr. Pehrson had fallen from that ladder?

A. Yes, I imagine he would.

Mr. Towles: That's all.

Mr. MacGillivray: That's all.

The Court: We will take a recess for fifteen minutes.

October 22, 1954—11:15 A.M.

JOE A. CHLOUPEK

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Judge Hawkins:

Q. Where do you reside?

A. At Careywood, Idaho.

Q. What is your occupation?

A. Laborer, and I try to farm a little.

Q. Were you employed in the summer of 1952 by C. B. Lauch Construction Company on the Cololla school?

A. Yes. [164]

Q. When did you start on that project?

A. At the beginning, I don't remember the date, but it was about in May.

Q. And what were your duties?

A. Laborer, cleaning up around and hauling materials.

Q. You did whatever was assigned to you by the foreman?

A. Yes, sir.

Q. You had been employed continuously there from the beginning of the project at least to September 12th?

A. That is right.

Q. Do you remember the day that Mr. Pehrson was injured?

A. I don't recall the date but I was there.

Q. You remember the happening of the event?

A. Yes.

(Testimony of Joe A. Chloupek.)

Q. You were on the project that day?

A. Yes.

Q. Were you present when Mr. Pehrson fell?

A. I was there when he was at the ladder, and I was there when he was on the ground.

Q. Who was there when you got to Mr. Pehrson?

A. The plumber, Mr. Van Slike I think his name is.

Q. He was the first one to get there and you were the second, is that it? A. Yes.

Q. You were familiar with the fact that there was a ladder there? [165] A. Yes.

Q. Had you used that ladder? A. Yes.

Q. How many times had you used it that day?

A. A good many times.

Q. Did you have occasion in your duties to go up that ladder and onto the roof? A. Yes.

Q. And had you done that that day?

A. Yes.

Q. Why would you go up to the roof?

A. Well, we had some work up there and I had been going up and cleaning up on the roof.

Q. How would you use the ladder to get on the roof?

A. Climb up onto this sill and then over.

Q. How would you get from the ladder over on the canopy or the ledge?

A. You would step over from the ladder to this balcony or whatever you call it.

Q. And then step over the parapet and onto the

(Testimony of Joe A. Chloupek.)

roof? A. That is right.

Q. And did you do that on September 12th, the day Mr. Pehrson was injured?

A. That's right.

Q. I will ask you to step down here and take a look at this model and then I will ask you whether that [166] represents the condition as it existed there that day?

A. Well, it looks to me as if the ladder should be longer.

Q. By longer you mean it should extend up further on the wall of the building?

A. Yes, because I don't think that you could step from here and reach down and get down the ladder. The ladder should be about half way up, about like this (indicating).

Q. So that you could walk up the ladder and step over the parapet?

A. You reached over to get hold of the ladder, from here (indicating).

Q. And could you do it on that day, on September 12th? A. That's right.

Q. This model does not show that any slab had been poured at the entrance way, had the slab been poured at the entrance way at the time of the accident? A. Right in front of the door?

Q. Yes. A. There was a step there.

Q. Handing you Exhibit Ten, what is that?

A. That is the front entrance.

Q. At the time of the accident was the sidewalks poured? A. No.

(Testimony of Joe A. Chloupek.)

Q. Was the slab in the front entrance way of the door poured? A. Yes.

Q. And that slab was poured up to how close to the brick line? [167]

A. I suppose that would be about eight inches.

Q. And that portion of the entrance way was completed on the day of this accident?

A. As I recall, yes.

Q. And the sidewalk itself extending from that entrance out had not been poured? A. No.

Q. What do you say as to the ground level as it existed on that day compared to the level of that slab poured in the doorway?

A. I believe that ground should have been a trifle higher to the bottom step.

Q. Higher than the step itself?

A. Yes, because in front all the way through I suppose about six or eight feet from the wall it had to taper up because this ground had settled against the foundation, it had tapered in, and I think if you would walk along this ledge of dirt you would possibly step down to the first step.

Q. And that ledge of dirt was out just a little?

A. Just a little, yes.

Q. Would that be about where the foot of the ladder was?

A. The foot of the ladder would be up against there, yes, on that bank.

Q. And comparing that picture, Exhibit Ten, with this model, are the ground levels the [168] same? A. I would say no.

(Testimony of Joe A. Chloupek.)

Q. Which is lower?

A. I believe this is. It should have been more sloping down about here at the bottom (indicating).

Q. Does the picture, Exhibit Number Ten, correctly reflect the ground level as of the 12th of September? A. No.

Q. Was it higher or lower?

A. I would say higher.

Q. The ground itself was higher than is shown here, so that a ladder resting on the ground as it was on September 12th would be higher than it would be shown here today? A. Yes.

Q. Did you ever have any trouble in going up that ladder and onto the roof? A. No.

Q. What precautions do you take prior to using a ladder either in ascending or going down?

A. I think it is an instinct to see that it is safe before you ever go up it. You naturally get a hold to see that it is solid.

Q. You test it to see that it is solid?

A. I think that is an instinct of a human being.

Q. You test the footing as well as seeing that it rests against the building?

A. That is right. [169]

Judge Hawkins: You may inquire.

Cross-Examination

By Mr. James G. Towles:

Q. Mr. Chloupek, did you test this ladder every time you went up to see that it was solid?

(Testimony of Joe A. Chloupek.)

A. I think it is an instinct to test it as you go up.

Q. Did you ordinarily just look at the ladder to see that it was in place?

A. Well, you would notice the ladder as you work around it, yes.

Q. But every time you don't pull it out from the building and then let it fall back against the building again, do you?

A. I don't think that you would do that, now.

Q. You don't think that is the ordinary thing to do? A. No.

Q. You spoke about this ridge of dirt being higher than is shown in the picture, Exhibit Number Ten I believe it is. Could you state to the best of your recollection how far back that ridge of dirt extended?

A. I think that I stated about six or eight feet—it was level at one time but I think that they were at times bringing in fresh dirt and I recall that we had water along the edge at some times and it had settled it against [170] the foundation and naturally it had settled down and tapered some.

Q. Isn't it a fact that they were still working on the foundation as Mr. Slentz testified?

A. I suppose that they were.

Q. Now then, isn't it a fact that Exhibit Number Ten shows the dirt is almost to the top of the concrete foundation wall? A. No, it is not.

Q. Within six or eight inches from the top of the wall?

(Testimony of Joe A. Chloupek.)

A. From the top of the concrete wall.

Q. Now from here (indicating) to the dirt, did you say it was six or eight inches?

A. I think it is six or eight inches from the step up, but it is below the step there (indicating). This is tapered out here from this point and it was higher here (indicating).

Q. Then could you explain to the jury how they could work on the foundation wall?

A. As I said, it had settled there and I don't know how much of the foundation they worked on.

Q. You don't know for sure the way it was there?

A. Well, I know that you could see the wall through there, but the ground had settled and I know there was a ridge through here (indicating).

Q. Do you know how deep the foundation wall was in the ground? [171]

A. Well, I suppose that it was down there about four and a half feet. I know that I helped dig that out.

Q. How much of the foundation was showing at that time?

A. Oh, I suppose there was better than a foot, probably fifteen inches I would suppose.

Q. Let me ask, have you had considerable amount of experience in climbing ladders?

A. Yes, I have.

Q. Is there any general rule of thumb that you use to determine how far the bottom of the ladder

(Testimony of Joe A. Chloupek.)

should be away from the wall that you are to climb?

A. Well, I would say that you would have enough slant so that you would feel safe.

Q. Would that be about one-fourth of the length of the ladder?

A. Well, I cannot say as to distance, but you could tell the slant you need to feel safe.

Q. Is it customary——

A. You couldn't climb the ladder if it was just about straight up and down.

Q. ——I understand, but is it customary if you are going to carry material besides the weight of your body, to have more of a slant?

A. Yes, you would have some slant, maybe a little more slant to it. [172]

Q. You would have the base of the ladder farther away from the wall?

A. Yes, if you are carrying material I believe you would.

Q. And do you recall how far the base of this ladder was away from the wall?

A. That would be quite hard to say, it might be three or four feet.

Q. Did it have quite a slope or slant to it or is it up against the wall?

A. No, it is not up against the wall.

Q. You would say that it was three or four feet away from the bottom of the wall, would you?

A. Possibly. I wouldn't know the distance because, of course, I didn't measure it.

Q. Do you know the distance between the top of

(Testimony of Joe A. Chloupek.)

the concrete ledge and the ground level at that time?

A. You mean the top of the roof down?

Q. No—from the top of the ledge down.

A. No, I don't recall, but I suppose it is about fourteen feet, I would say thirteen or fourteen feet.

Q. And if the ladder was four feet away from the bottom of the wall and it had a fourteen-foot distance to go up the wall, then, it couldn't have extended very far above that point, could it?

A. I don't think that your ladder is long enough for this model. [173]

Q. Wasn't that a sixteen foot ladder?

A. I don't know just what your ladder was there, but I don't think that this is long enough for this model.

Q. Was this over there in position?

A. It wasn't extending from the roof.

Q. Where was it setting?

A. I would say about half way, because you sort of reached over to get hold of this edge. I think it was about like that (indicating).

Q. In other words, the top rung of the ladder would be a little bit above the top of the ledge?

A. I am sure of that, yes. This ladder should have been setting about like that (indicating), about half way between.

Q. And the ordinary person is about five and a half or six feet—between that—tall?

A. I suppose.

Q. Is it also true that there is about one foot in between each of the rungs?

(Testimony of Joe A. Chloupek.)

A. Yes, I suppose so.

Q. And in order for a person to firmly grasp the top of the parapet wall he would have to be within six feet of the top of the wall?

A. Will you state that again, please?

Q. Yes, in order to firmly grasp the top of the parapet wall and climb to the ledge he would have to be within [174] six feet of the top?

A. To get his foot on that (indicating)?

Q. Yes. A. According to this, yes.

Q. And if he came up and stood on the second rung of the ladder—do you see what I am getting at?

A. Yes, I see.

Q. Which is ordinarily, as I understand the testimony, that is the way everybody got up there, they got up on the second rung and stepped over onto the ledge.

A. Well, I don't know if you could get in the position to do that or not. If it was higher you possibly could, yes.

Q. But if they were that far up on the ladder, then they couldn't possibly hold onto the ladder with their hands, could they?

A. Well, if you are climbing onto the balcony there, you could probably reach the top, yes.

Q. If you are standing on the second rung of the ladder it is obvious that the top standard of the ladder which is at this point here (indicating), the top of the standard there is only about two or two and a half feet from the bottom of your foot, isn't that right?

(Testimony of Joe A. Chloupek.)

Judge Hawkins: Do you understand what he is talking about? A. Well, I am not sure.

Q. You are standing on the second rung now, is that clear? [175]

A. Yes, but according to this it would not be two feet, would it?

Q. Well, I believe that you testified that those rungs were on **twelve-inch centers**.

A. Oh, yes, two feet, that is right.

Q. And ordinarily the standard would extend another twelve inches? A. Yes, that is right.

Q. So it would be rather difficult to grasp the top of the standard and stand on the second rung?

A. You probably could, that is, if you were a short man.

Q. He would have to be very short, wouldn't he?

A. That's right.

Q. And if he was standing on the next to the top rung, it would be practically impossible for him to have any other contact with the ladder except with his feet?

A. If he reached high enough, that would be right, yes.

Q. And moving to the right or to the left would tend to throw the ladder one way or another, isn't that true?

A. Not if the ladder is solid, not if he got a good grasp.

Q. Or, of course, if the ladder was tied to the top, is that true? A. That is right.

(Testimony of Joe A. Chloupek.)

Q. And was this ladder tied at the top?

A. It was not.

Mr. Towles: That is all, you may examine. [176]

Redirect Examination

By Judge Hawkins:

Q. Mr. Chloupek, was it necessary to get hold of the parapet in order to get from the ladder over onto the ledge, or could you walk up the ladder and just step over onto the ledge?

A. I think we got up high enough so that we could get hold of the top. I just don't recall exactly right now.

Q. You could do it either way, is that right?

A. It seemed to me that we could, yes. We would always take a safe precaution in getting down by holding on.

Judge Hawkins: That is all.

Recross-Examination

By Mr. Towles:

Q. What was it that you took hold of, was it the top of the parapet wall or the ladder?

A. Coming down or going up?

Q. Either way.

A. I think you would get hold of the top of the wall to hold on in going over; you wouldn't just step right out.

Q. You couldn't just bend all the way over and get hold of the top of the ladder?

(Testimony of Joe A. Chloupek.)

A. I don't think that the ladder was that low, that is that you would have to bend over.

Q. Did you or didn't you, when you were up there; you must remember? [177]

A. Will you state that question again?

Q. You must have remembered in going on and off that roof and getting on and off that ladder, whether you took hold of the top of the ladder standard or whether you took hold of the wall?

A. You would have to get hold of the wall as you got over on the balcony.

Mr. Towles: I think that's all.

Judge Hawkins: That is all.

ARNOLD PIEHL

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Judge Hawkins:

Q. Where do you reside, Mr. Piehl?

A. At Sandpoint, Idaho.

Q. And what is your occupation?

A. I am a carpenter.

Q. And how long have you been a carpenter?

A. Oh, I did carpenter work since 1925—I would say between 1925 and 1930.

Q. How old are you, Mr. Piehl?

A. I am fifty-five years old.

Q. Incidentally, how tall are you?

(Testimony of Arnold Piehl.)

A. I am about five feet and two inches, two or three inches. [178]

Q. Were you employed on the construction of the Cocolalla school? A. Yes, I was.

Q. And in what capacity? A. Carpenter.

Q. Were you employed there from about the beginning of the job down to its conclusion?

A. No, I wasn't there right at the beginning. I was there after they had started and then I worked there for about two weeks, and then after that I went over to the Pack River school.

Q. You say that you were there about two weeks? A. Yes.

Q. Were you there when Mr. Pehrson fell from the roof; do you recall that incident?

A. I was called back to the Cocolalla School to help finish up there. I was called back from the Pack River School, yes, I was there at that time.

Q. How long were you there prior to this accident if you recall?

A. I don't recall for certain if it was the same day or the day before I came back. That is, I don't recall whether I came back that day or a day before.

Q. Are you familiar with the ladder that was placed against the building near the entrance way on the south side of the school? [179]

A. Yes, sir.

Q. Had you used that ladder there at times?

A. Yes.

Q. How many times had you used it?

(Testimony of Arnold Piehl.)

A. I don't know exactly how many times—when I came back from the Pack River School I put the flashing on the top part of the parapet wall.

Q. That is the parapet wall along the front of the school there?

A. The low wall where the rooms are, not where the gym is.

Q. Had you ever used this ladder at this particular location? A. Yes, I had.

Q. Had you ever had any difficulty in using it?

A. No.

Q. How would you get onto the roof by means of that ladder?

A. The way that I got on the roof, I would climb up the ladder and step over on the balcony there, or the canopy or whatever you call it, and then jump over the parapet wall.

Q. Had you done that many times?

A. Yes, I had.

Q. Had you ever had any difficulty in doing it?

A. No, I hadn't.

Q. Did you carry tools with you?

A. Yes, I did.

Q. So that you would have but one hand free to use on the ladder? [180] A. Yes.

Q. Did you ever have any difficulty in getting up that ladder and over on the canopy and thence over on the roof? A. No.

Q. Did you ever have any trouble coming down that ladder from the roof? A. No.

(Testimony of Arnold Piehl.)

Q. Was that ladder built in accordance with construction of ladders on jobs of that kind?

A. I think that it was. Of course, I cannot say for sure.

Q. There were ladders there, around the building there to use in getting on the roof at different places and from different points?

A. As I recall the day that we were there working in putting on the flashing, there were different ladders there—you call this the south side—then, yes, there would be a ladder over on the east side of the building.

Q. Now, were you there the day that Mr. Pehrson fell? A. Yes, I was.

Q. Did you see him fall? A. No.

Q. Did you come up to the scene of where he was lying after the accident? A. Yes.

Q. You saw him lying there? [181]

A. Yes, when I came out. I was eating my dinner at the time and someone came and said that he fell and I went out and he was sitting on a concrete block—I believe it was a concrete block.

Q. Were you there when he was taken in an ambulance, when he was put in an ambulance and taken away?

A. I didn't see that. I had gone to work by that time.

Q. Which side of the ladder, as you faced the ladder and looking toward the school, which side was he on, if you recall, or do you recall?

(Testimony of Arnold Piehl.)

A. I have an idea——

Q. You can step down and look at this model if you care to. Do you recognize that?

A. ——Yes, I think that he was sitting about here (indicating).

Q. You are pointing to a point that is to your right a little bit?

A. Yes, I would call it to the right of the ladder if I was facing it.

Q. Yes, that is what I mean. A. Yes, sir.

Q. And he was lying or sitting in that position when you saw him? A. Yes.

Q. Did you look at the ladder at that time and notice if it was still standing there?

A. It was still standing, but I didn't pay any attention to the ladder. [182]

Q. Did you see anything wrong with the ladder at that time? A. No.

Q. Was it standing at a proper angle?

A. It seemed to me that it was standing the same way that it always was.

Q. What precautions do you take, Mr. Piehl, before climbing any ladder?

A. Well, I usually have my hands full of tools and I step on the first round, and if it doesn't move then it is safe for me to go on up. That is the way I always figure it.

Q. That is after you put your foot on it to test it to see if it is solid?

A. Well, it will wiggle all right if you have your hands full of tools and step on the first round. It

(Testimony of Arnold Piehl.)

moves a little one way or the other and it will move for sure one way or the other if it ain't solid.

Q. And had that ladder ever wiggled one way or another with you when you used it to go onto the roof? A. No, not that I recall.

Q. And had it wiggled, would you have stopped and adjusted it so that it would not wiggle?

A. I most certainly would, yes.

Judge Hawkins: That's all, you may [183] examine.

Cross-Examination

By Mr. James G. Towles:

Q. You have stated, Mr. Piehl, that Mr. Pehrson was sitting on a concrete block. Now, was he sitting or lying on that concrete block?

A. To my knowledge, he was sitting on the concrete block.

Q. And you also stated that you don't stop and pull the ladder out from the building and let it fall back and pull out any block from under the bottom, you just step on the ladder and go on up?

A. If you have your hands full of tools, you don't do too much pulling around of the ladder. If you step on the first round and it doesn't move or give then it is safe to go on up.

Q. It isn't customary, then, to adjust the ladder and move it back and forth and determine if it is solid? A. A lot of them do, but I don't.

Q. Is it the customary thing; do you see the workmen ordinarily do it?

(Testimony of Arnold Piehl.)

A. I see some of them do it and some of them don't.

Q. Would you say that the majority of them do it?

A. Quite a few of the boys do, some of them don't.

Q. Mr. Piehl, you are naturally familiar with the length of two-by-fours, and by looking at them you could tell about the length of a certain two-by-four, you could estimate that? A. Yes. [184]

Q. How long would you say that the standards were on this ladder?

A. I would say that they were sixteen foot anyway.

Q. Did you notice whether this ladder was fastened at the top?

A. I don't think that it was.

Q. Was it fastened at any other place?

A. I don't think so, no.

Q. You mentioned the fact that you had your arm full or your hand full of tools when you stepped on the ladder. Did you ordinarily carry them in a box? A. Yes.

Q. Then you always had one hand free so that you could climb up the ladder? A. Yes.

Q. And then when you got to the top of the ladder, did you take hold of the top of the parapet wall? A. No.

Q. You just stepped right off onto the top of the concrete ledge? A. Yes, sir.

Q. Do you recall approximately how high it is

(Testimony of Arnold Piehl.)

from the top of the concrete ledge to the top of the parapet wall?

A. I would say that it would be about eleven feet or a little better.

Q. I believe that you must have misunderstood me—from [185] the top of the parapet wall to the top of the ledge—from the top of this wall here to the top of this ledge (indicating).

A. I see, that would be about thirty inches. I know that I had to put my hands up there and put the tools over first and jump up because I am too short to step over, it was too high for me.

Q. In other words, ordinarily you would have to jump over the top of the parapet when you got on top of that ledge? A. Yes.

Mr. Towles: That is all.

Judge Hawkins: That is all.

EDGAR JUDY

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Judge Hawkins:

Q. Will you state your name, please?

A. Edgar Judy.

Q. And your age, Mr. Judy?

A. Forty-one.

Q. Where do you reside?

A. At Careywood.

Q. And that is not far from Cocolalla?

(Testimony of Edgar Judy.)

A. Four miles. [186]

Q. What is your occupation?

A. I am a laborer and farmer.

Q. Do you do carpenter work?

A. Well, I am a laborer, I have done labor.

Q. Did you work on the project known as the Cocolalla school? A. Yes, I did.

Q. In what capacity? A. Well, I was——

Q. What were your duties there?

A. ——I helped the carpenters, I furnished materials to them and I cleaned up around the place there. I just did various jobs.

Q. You did about the same thing as Mr. Chloupek? A. Yes.

Q. Were you working there prior to September 12, 1952? A. Yes.

Q. How long did you work there?

A. I started in May, I guess it was.

Q. And you worked there until after September 12th? A. Yes, I did.

Q. In the course of your employment there, did you see Mr. Pehrson around the project from time to time? A. Yes.

Q. Do you recall how many times you saw him there?

A. I guess probably once a week. [187]

Q. About once a week during the time that you were there? A. Yes.

Q. Did you see him going around the premises and inspecting the various parts of the premises?

A. Yes.

(Testimony of Edgar Judy.)

Q. Did you see him there on September 12th?

A. I don't remember, but I believe that I did.

Q. You didn't see him fall?

A. No, I didn't.

Q. You know the ladder that we have been talking about here?

A. Yes.

Q. The ladder that was near the entrance on the south side of the building?

A. Yes.

Q. Had you ever used that ladder?

A. Yes, quite often.

Q. And for what purpose did you use it?

A. To get on and off the roof.

Q. Did you carry materials up and bring them back?

A. Yes.

Q. In your hands?

A. Yes, such material as nails and maybe a skill saw, or something like that.

Q. Yes, tools that a carpenter ordinarily would need in his work?

A. Yes. [188]

Q. How many times did you climb up and down that particular ladder at that school building?

A. Well, I don't know, it would depend on the job that they were doing and how much material they used.

Q. Did you go up there several times a day?

A. Yes.

Q. Every day?

A. Yes, I believe every day.

Q. This ladder was located next to the canopy there, was it?

A. Yes.

(Testimony of Edgar Judy.)

Q. And did it lean against the wall of the building? A. Yes.

Q. The footings were in the ground solidly?

A. Yes.

Q. Did you ever have any difficulty in the use of that ladder, that is, in the swaying or shifting in any way? A. No.

Q. Was it built solidly and strong and sturdy?

A. I remember it was a good, sturdy ladder.

Q. As you went to the roof, using that means, would you step over onto the ledge or the canopy?

A. I am sure that I stepped over onto the canopy from the ladder.

Q. How did you get on the roof after you got on the canopy?

A. Well, at the parapet wall there I kind of boosted myself over it. I would throw one leg [189] over.

Q. Now then, that canopy, how wide was that from the wall out?

A. I would say that it was as wide as that table (indicating).

Q. There was plenty of room to stand on it?

A. Yes.

Q. As wide as the table I am sitting at?

A. Yes.

Q. In the event of using a ladder, what precautions do you take to see that the ladder is safe?

A. I think that a person's natural instinct is that he feels to see if it is solid and safe before he goes on up.

(Testimony of Edgar Judy.)

Q. That is the precaution that you take before you use one? A. Yes.

Q. You are not now employed by the Lauch Construction Company? A. No, I am not.

Q. You are just farming now? A. Yes.
Judge Hawkins: That is all.

Cross-Examination

By Mr. James G. Towles:

Q. Mr. Judy, was this ladder the main means of access to this roof? A. Yes.

Q. That is what most everybody used to get up there? [190]

A. This ladder, at that time, was the one that we used the most, it was the handiest.

Q. Do you recall whether or not, on that day, there were any other ladders in the vicinity there, in the vicinity of the building and about that place?

A. I don't think there was on that side of the building.

Q. Was there any on any other side of the building that day?

A. I am not sure, I don't remember about that day exactly, but I do remember that there was three about the building, one on the end and one at this canopy and then there was one on the other side about straight across.

Q. And they were ordinarily laying down or standing up against the building?

A. The one on the end some of the time was

(Testimony of Edgar Judy.)

down because they would move it to take equipment through there.

Q. Was there any ladder on that building that reached over the parapet wall at any time?

A. Yes, it did, the one that was on the other side of the building.

Q. It went over the top of the wall, did it?

A. Yes, it did.

Q. Now a ladder such as that, one that goes over the top of the wall, is it easier or safer to use?

Judge Hawkins: Safer than what?

Q. Safer than the ladder such as we have here?

A. Where you have the ledge there, I believe that this [191] kind of a ladder was probably the best to get on the roof.

Q. When you reached the point to step on the ledge what did you hold with; that is, what did you use your hand to hold on?

A. Well, the upper part was at least one rung above the ledge and I would hold the ladder with my left hand.

Q. Would you give that answer again because I doubt whether anybody heard it.

A. When I would climb up to the ledge and would step over from the ladder I think there was at least one rung above the canopy, one rung of the ladder.

Q. Did you state that you would hold onto the ladder as you stepped over?

A. As I remember it, that is the way that I did.

Q. And you didn't hold onto the wall?

(Testimony of Edgar Judy.)

A. Probably at times I did, but I think the ladder is what I used.

Mr. Towles: That is all, Mr. Judy.

Judge Hawkins: That is all.

The Court: We will adjourn at this time until two o'clock this afternoon.

October 22, 1954, 2:00 P.M.

KERMIT BERGMAN

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. MacGillivray.

Q. Where do you live, Mr. Bergman?

A. Sandpoint, Idaho.

Q. What is your occupation?

A. Carpenter.

Q. How long have you been a carpenter?

A. For twenty years.

Q. By whom are you employed at this time?

A. I am employed at Libby, Montana, for the J. Neill Lumber Company.

Q. Were you employed for the C. B. Lauch Construction Company during the spring and summer of 1952 on the Cocolalla school? A. Yes.

Q. In what capacity? A. As a carpenter.

Q. When did you start on that job?

(Testimony of Kermit Bergman.)

A. I can't fix the exact date, but I think it was around the first part of August.

Q. So that you had worked there from the first of August at any rate, up to the 12th of September, when Mr. Pehrson had his fall?

A. Yes. [193]

Q. At the time that he had that fall, was the sidewalks in, in front of the building?

A. No, I don't think it was.

Q. Did you have anything to do with putting in

A. As I remember, I helped put in the forms the sidewalks subsequent to that time?

A. As I remember, I helped put in the forms for the sidewalks just prior to that time.

Q. The concrete slab and the step had been laid prior to that time? A. Yes.

Q. Did you have anything to do with laying the sidewalks after that?

A. Yes, I helped put the forms in for the sidewalk.

Q. Can you tell when the sidewalk was put in, in front of the building, that is, can you tell us, did you excavate to put in the forms or did you have to fill in?

A. We had to dig out about six inches.

Q. Do you remember what the ground level was immediately in front of the building in relation to the finish line immediately below the foundation?

A. As I remember it, when we put in the form for that first step, there was a grade there and one step and we had to dig down a little bit below the ground level to get the grade for that step.

(Testimony of Kermit Bergman.)

Q. So that after you put the first step in approaching [194] the building, would you have to step down for that or did you have to step up?

A. Directly in front, you would have to step up, but out towards the side it was about level with the top of the ground.

Q. Toward which side, would that be toward the left looking at the building?

A. Toward the left, yes.

Q. Are you familiar, Mr. Bergman, with the ladder that we have been talking about here that was used to get on the canopy and on the parapet wall?

A. Yes.

Q. Have you ever had occasion to use that ladder?

A. I have used it quite a number of times.

Q. How often each day would you use it?

A. I would say four or five times a day, at least.

Q. And was that for the purpose of getting on the roof?

A. Yes, sir.

Q. When you used that ladder, just how did you get from the ladder to the canopy and then onto the roof?

A. I would walk up the ladder, step over on the canopy and throw my leg over and get on the roof.

Q. And did the ladder extend far enough above the canopy so that you could step onto the canopy off the ladder without any difficulty?

A. As I remember it, yes. [195]

Q. And did you carry any carpenter tools or material or anything?

A. Oh, yes.

(Testimony of Kermit Bergman.)

Q. And what kind of equipment did you carry up there?

A. Well, tools that a carpenter generally uses, sometimes nails and sometimes a short piece of lumber.

Q. Did you take those up in a carpenter's tool box?

A. I don't remember ever taking any tool box up with me, but it was generally under one arm or in one hand.

Q. Did you ever have any difficulty in using that ladder, Mr. Bergman? A. No.

Q. Now then, was it your custom in using that ladder of any other ladder, that is any other portable ladder, to take any precautions to see that the ladder was solidly set at the bottom and the top before going up or going down the ladder?

A. I think any construction man takes that precaution. I know I always do.

Q. And having taken that precaution, you never had any difficulty with that ladder? A. No.

Q. Has it ever slid or shifted from one side to the other in your going up or coming down?

A. Not that I remember.

Q. Was that ladder a good, sturdy and solidly constructed ladder? [196]

A. Yes, it was almost a new ladder. I know it was recently built.

Q. Are you confident that it was built there on the job, on that project? A. Yes.

Q. Did you build it?

(Testimony of Kermit Bergman.)

A. No, I didn't help build it.

Q. Did you see other carpenters build it?

A. Yes.

Q. Were you present there on that project the day that Mr. Pehrson had a fall? A. Yes.

Q. Where were you working?

A. As I remember I was on the other side of the building at that time. I know I didn't see him fall.

Q. You didn't see him and you didn't know how or why he fell?

A. I didn't know very much about it until it was all over with.

Q. Did you come around to the front of the building after he had this fall, and before he was taken away? A. No, sir, I didn't.

Q. Then you didn't see Mr. Pehrson that day at all?

A. Oh, yes, I saw him before the accident.

Q. But after he sustained his fall, you didn't see him? A. No, sir. [197]

Mr. MacGillivray: That is all, you may examine.

Cross-Examination

By Mr. Funkhouser:

Q. On those occasions when you walked up that ladder did you go over the parapet wall, and if so, how?

A. I would throw my leg over, and then step over.

(Testimony of Kermit Bergman.)

Q. You would throw your leg over from the ladder? A. No, from that concrete ledge.

Q. When you would step onto the ledge would you put your hand over the parapet wall?

A. As I recall it, I never did it that way.

Q. You are not positive about that, are you?

A. I am quite positive.

Q. But you could be mistaken?

A. It is possible.

Q. When you would go up on that ladder, would you go up to the last round or the next to the last round?

A. No, it wasn't the last round, I think there were about two other rounds on the ladder.

Q. Now then, you tell the Court and the jury that there would be two more rounds ahead of you?

A. As I remember it there was, yes.

Q. You would step from the third round down?

A. I would say so.

Q. You would stand on that round and step up onto the ledge? A. Yes, I think so. [198]

Q. You think so, but you are not sure, are you?

A. No, it has been quite a while ago.

Q. You don't know, do you?

A. Well, no, not really, I don't.

Mr. Funkhouser: That is all.

(Testimony of Kermit Bergman.)

Redirect Examination

By Mr. MacGillivray:

Q. Whether you stepped from the second round, or the third, or the fourth, whichever one it was, you had no difficulty in going up the ladder and stepping from the ladder onto the ledge? A. No.

Mr. MacGillivray: That's all.

Mr. Funkhouser: That is all.

GERALD F. LOVELAND

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. MacGillivray:

Q. Will you state your name?

A. Gerald F. Loveland.

Q. Where do you live?

A. 9415 East Mission Avenue, Spokane, Washington.

Q. And what is your business or occupation?

A. General contractor. [199]

Q. How long have you been in that business?

A. Between fourteen and fifteen years.

Q. What kind of construction do you do?

A. Commercial work, mostly warehouses, churches and office buildings, and the like.

Q. Without going into any complete detail, will

(Testimony of Gerald F. Loveland.)

you just tell us what are two or three of the places you have constructed?

A. Well, in Couer d'Alene here we built the Christian Church in 1945, and in Kellogg we built the Thornhill McGlade Funeral Home and various warehouses and churches and office buildings in Spokane.

Q. Have you constructed any one-story school buildings? A. Yes, we have.

Q. Now then, in the construction of one-story school buildings where there is a parapet wall sixteen feet high, is it customary to use as a means of access to the roof of that building, a portable step-ladder? A. Yes, we use portable ladders.

Q. Is that what almost universally is used?

A. Yes, ladders are used.

Q. In this case—let me ask, have you ever seen the Cocolalla school building?

A. Only from the highway. I have never been over closer.

Q. The front entrance is constructed somewhat in accordance with this model, with the top of the parapet wall showing [200] here (indicating) and over the front entrance is a ledge or canopy approximately ten or eleven feet long and thirty inches deep and thirty-two inches below the top of the parapet wall; now, in order for the workmen to reach the roof of the building would it be common and the accepted practice to have a stepladder that could be leaned against the front of the canopy or against the wall of the building to the side of the

(Testimony of Gerald F. Loveland.)

canopy, extending far enough above the canopy so that the workmen could walk up and take their materials and set it down——

Mr. Funkhouser: Now, just a minute, if the Court please. This is three or four questions in one, it is a compound question and I don't believe that it is proper.

The Court: Well, if the witness understands, I will let him answer.

Mr. Funkhouser: He is suggesting that the witness state how he would do it and I don't believe it is proper.

The Court: He may answer.

Q. Now I presume that you remember how far I had gotten with the question?

A. Yes, I do.

Q. To continue, that the ladder extends far enough above the ledge or canopy so that a workman can climb up the [201] ladder and lay his materials on the canopy and step from the ladder to the canopy and then over the thirty-two inch parapet wall to the roof, would the use of a ladder be common and accepted practice in that?

A. I would say that it would be good practice.

Q. And in the use of ladders in the construction of buildings such as this, one-story buildings, where ladders are used in various ways and places, is it customary and common construction practice to tie the top of the ladder to the concrete wall of the building?

A. No, it is not.

Q. Mr. Loveland, what is the first precaution

(Testimony of Gerald F. Loveland.)

that any construction worker takes for his own safety in using portable ladders?

A. The first thing that we instruct our men is to inspect the footing and see that the ladder is on good footing.

Q. And what is the next point?

A. The next point is to see that you have the proper pitch so that there is no danger of falling backward.

Q. And do you take the precaution to see that the ladder is plumb against the surface at the top?

A. Yes.

Mr. MacGillivray: You may take the witness.

Cross-Examination

By Mr. Funkhouser:

Q. Isn't it a fact that ordinarily in the use of a ladder, [202] the ladder would extend all the way to the top of the building?

A. Not necessarily.

Q. Not necessarily but ordinarily that is true, would you say? A. No.

Q. How long have you been in the construction work?

A. Between fourteen and fifteen years.

Q. And what are you building at the present time?

A. At the present time we just completed a warehouse building.

Q. How many stories? A. One story.

(Testimony of Gerald F. Loveland.)

Q. You have been over to the Coliseum, have you not?

A. No, I haven't followed the Coliseum job; I haven't stopped at the job, I have been by there.

Q. And did you notice that where they were going on the roof with ladders that it extended even above the roof like this, this longer ladder here?

A. No, I haven't noticed anything on the Coliseum building.

Q. You have not observed that?

A. No, sir.

Q. When you are building a building in your work, you use short ladders do you?

A. We use both short and long ladders.

Q. Yes, you would have both?

A. Yes. [203]

Q. So that they could use both, you would have the long and the short?

A. We possibly would.

Mr. Funkhouser: That is all.

Redirect Examination

By Mr. MacGillivray:

Q. Height of the ladder would depend on the point that you wanted to reach? A. Yes.

Mr. MacGillivray: That is all.

Mr. Funkhouser: That is all.

CHARLES E. BRUNET

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. MacGillivray:

Q. Where do you live, Mr. Brunet?

A. 1821 East North.

Q. And what is your occupation?

A. Sheet metal roofing installation.

Q. And that is what is known as a roofing contractor? A. Yes.

Q. How long have you been in that business?

A. Since 1937.

Q. Do you sub-contract various types of construction? A. We do. [204]

Q. Is that both on one-story and multiple story buildings? A. Yes.

Q. What is customary in the construction business to be used, and what is customarily used as a means of access to the roof of one-story buildings?

A. Stepladders.

Q. And I assume the height of the ladder used would depend on the height of the surface you wanted to reach? A. That is right.

Q. By stepladders do you mean the kind of ladder that is shown here?

A. We use that kind of ladder, yes, that is recommended by the state, yes, we use that.

Q. That is the type that is commonly used?

A. Yes.

(Testimony of Charles E. Brunet.)

Q. In using such ladders, have you sometimes used those at different points or spots around the building? A. Yes.

Q. And when such ladders are used at different places about the building, is it commonly accepted practice in the construction work to nail down, or bolt down, or tie down the top of the ladder to the cement wall, or whatever type of surface it is?

A. No, it is not customarily done.

Q. I will ask you now, Mr. Brunet, what, in the construction business, is the first precaution that anyone takes for [205] his own safety in attempting to ascend or descend a portable ladder that is used in different positions about the building?

A. The footing.

Q. What do you mean?

A. That is the base, to see that it is solid and sound.

Q. You mean to see the standards are solidly placed?

A. The footings, the bottom, wherever you put the ladder to see that it is a form that doesn't tip, to see that the bottom is firm and that it does not tip from one side to the other.

Q. And do you, for your own safety, use the precaution of seeing that it is plumb at the top?

A. Yes, sir, absolutely, that is for the safety of the men.

Q. And any man in the construction business does that for his own safety?

A. Absolutely.

Mr. MacGillivray: You may cross-examine.

(Testimony of Charles E. Brunet.)

Cross-Examination

By Mr. Funkhouser:

Q. You speak of stepladders and also you said something about approved by the state by some regulation or safety code?

A. There are standards of ladders that are required by the state. It is termed a standard ladder. [206]

Q. And they let you use a stepladder up to twenty feet?

A. And extensions up to forty.

Q. When we look upon ladders and refer to them as stepladders, that is something like this, that is what we call a stepladder?

A. Not that type.

Q. Well, it is along that line (indicating)?

A. One single ladder, yes.

Q. And there is a lever in here, isn't there?

A. No.

Q. On a stepladder? A. No.

Q. Well, what do you mean, just explain what you mean by a stepladder?

A. Well, here is a single stepladder (indicating).

Q. And that is what you use?

A. Yes, and then they are used with extensions, an extension has a pin here and you can extend them on up.

Q. And you would use an extension ladder on a building of this character?

(Testimony of Charles E. Brunet.)

A. Not necessarily, the height has all the factors in that.

Q. If you were on a building like this, you would want a ladder to come to the top of the building?

A. Not necessarily.

Q. Not necessarily, why?

A. Well, it depends on what portion of the building you want to get to. [207]

Q. Well, to get material onto the top of the building?

A. You would extend it at least to the top.

Q. Yes, to the top of the building?

A. Yes.

Mr. Funkhouser: That is all.

Redirect Examination

By Mr. MacGillivray:

Q. If the point of getting off the ladder is a ledge or canopy such as shown on this model, would you use a ladder that is long enough so that the workmen can step off the ladder onto the canopy?

A. Yes, that is right.

Q. Assuming in this case that you had this canopy (indicating) which is thirty-two inches down below the top of the parapet wall and extending out from the parapet wall for thirty inches and is ten or eleven feet in width, would it be accepted practice in the construction business to have such a ladder either against the outside of the canopy itself or against the side of the canopy or at the wall high

(Testimony of Charles E. Brunet.)

enough so that a man climbing up from the front or the side can step off the ladder onto the canopy, and then from the canopy onto the roof?

A. Yes, many times we find that in the construction it is more convenient to put the ladder in one place or another, that is usually for the footing because during the construction of the building there are sometimes places [208] that you do not have access to.

Q. And in the case of the construction as it appears here, would it, in your opinion, as a roofing contractor, be more convenient for workmen attempting to get to the roof of the building to put material off on the canopy such as this, and then step off the ladder on the canopy and then over the parapet wall on the roof?

A. As far as we are concerned, we always use a hoist, that is customary.

Q. By materials, I mean carpenter materials such as nails, and so forth?

A. Well, we just use them for access purposes.

Q. Counsel has asked here about the Coliseum. Have you ever been over to the Coliseum?

A. I have been by there several times.

Mr. MacGillivray: That's all.

Mr. Funkhouser: That is all.

Mr. MacGillivray: The defendant rests, your Honor.

The Court: Do you have any rebuttal?

Mr. Towles: Yes, we will call Mr. Hurst.

The Court: I will let the jury retire for a moment. [209]

(In the absence of the Jury.)

The Court: What do you expect Mr. Hurst to testify to?

Mr. Towles: There has been testimony here that when Mr. Pehrson fell off the ladder it was in the same position that it should have been in at the top, and Mr. Hurst will testify that he was on the roof of the building and, of course, came down the ladder, and when he went to get on the ladder that the ladder had slipped over some little distance and it was not straight up and down but was leaning over and, of course, that he had to straighten——

Judge Hawkins: It is no different than the testimony that is already in the record by Mr. Pehrson, and we have introduced no testimony that would give rise to any such rebuttal, and we object to it.

The Court: I believe that it was a part of your case in chief, and, in fact, you went into all of the movements of this matter on your case in chief.

Mr. Towles: There is another matter here, at least an inference that at the time Mr. Pehrson fell that he was lying in front of the canopy which at least gives an inference that he fell from the canopy and not from the ladder. [210]

The Court: You have proved conclusively where he fell, on your case in chief, and you have proved already where he was when he regained conscious-

ness. If there is any objection to this rebuttal testimony I will sustain the objection.

Judge Hawkins: There is an objection, your Honor.

The Court: I will sustain your objection. You may recall the Jury, Mr. Bailiff.

(In the presence of the Jury.)

The Court: Do you have any further witnesses?

Mr. Towles: Yes, we will call Mr. Pehrson in rebuttal.

G. A. PEHRSON

having heretofore been duly sworn, testifies as follows in rebuttal.

Direct Examination

By Mr. Therrett Towles:

Q. Mr. Pehrson, did you have a conversation with Mr. Richardson, the Superintendent at that building, with reference to the situation as to where this ladder was located? A. Yes.

Q. How long before the accident was this?

A. I would say about a week previous. [211]

Q. What did you say to Mr. Richardson?

Judge Hawkins: Now I object to this. This certainly is a part of their case in chief. He had this conversation and it was known at the time they were putting on their case in chief and we will object to it as not proper rebuttal. We could go back over all of the evidence if this is allowed.

The Court: The objection is sustained.

(Testimony of G. A. Pehrson.)

Q. Do you want to make any statement in regard to the grade level around this ladder?

Judge Hawkins: We make the same objection to this.

The Court: Yes, we are just starting to try the case all over again. This witness testified to this at the time he was on the stand before. The objection is sustained.

Q. I will ask you this, can you stand on the second rung of a ladder and balance yourself without holding onto something?

Judge Hawkins: We object to this as incompetent, irrelevant and immaterial and calling for a conclusion of this witness. This is a part of their case in chief.

The Court: Yes, he went into everything concerning this ladder and it would not [212] be proper rebuttal. The objection is sustained.

Mr. Towles: The plaintiff rests.

Mr. MacGillivray: The defendant rests.

The Court: I will excuse the Jury for a moment again.

(In the absence of the Jury.)

The Court: I excused the Jury in order that you may renew your motion if you care to.

Mr. MacGillivray: Comes now the defendant at the conclusion of all of the evidence, both the defendant and the plaintiff having rested, and again challenges the legality of the evidence to sustain any verdict against the defendant and move for a

directed verdict in favor of the defendant and against the plaintiff, and makes the same motion and upon the same grounds as the previous motion. First, there is no evidence of any primary negligence on the part of the defendant. That ground is based upon the principle of law that the defendant owes Mr. Pehrson, as an invitee, of course, the duty to maintain the premises in a reasonably safe condition, but the law further being that such duty only exists, the law further being that such duty only exists insofar as latent hidden defects are concerned and that no such duty [213] arises or exists as between the defendant and the invitee upon the premises insofar as obvious or apparent dangers or defect, if any such exists, are concerned.

(Further remarks of counsel not reported.)

The Court: I will say to you at this time, Gentlemen, that I feel, just from a first impression that I have that the Motion should be granted. However, in view of the Rules and in view of the fact that you are given an opportunity to renew this Motion after verdict if you desire, and the Court then would then have time to consider it more thoroughly, I will, at this time, deny your motion, and I will ask Counsel to meet me in Chambers and we will go over the instructions. We will take a short recess at this time.

(The following proceedings after a short recess.)

The Court: I think, Gentlemen, I will limit you,

as you suggested, to one-half hour on a side, and you may divide the argument in any manner you desire.

(Argument to the Jury.)

INSTRUCTIONS OF THE COURT

The Court: Ladies and Gentlemen of the Jury: It is the duty of the Court at this point in the trial of this case to instruct you, or to advise you as members of the jury as to the principles of law applicable to this particular case. [214] At this point I want to impress it on the jury that you are the judges of the facts. It is your responsibility to pass on the questions of fact, and likewise it is my duty to pass on all questions of law, and it is your duty, and you must under your oaths, accept the instructions given you as the law in this case. I will also say to you that you should not take any particular statement of the Court or any particular portion of the instructions of the Court as being the whole law, and you should not place any undue emphasis on any portion of the instructions, but the instructions of the Court should be considered as a whole, applicable to the entire case.

You will also disregard any statement made by counsel on either side which is not sustained by the evidence, and any evidence which may have been offered on either side and not admitted by the Court, and any evidence which after the admission was stricken by the Court.

The Statements of the attorneys in the case, made at the trial and in their arguments are not evidence and should not be considered as such by you.

Your verdict must be based upon the evidence. In arriving at it you should not discuss or consider anything in connection with this case except the evidence received upon the trial.

It is your duty to weigh the evidence calmly and [215] dispassionately, to regard the interests of the parties to this action as the interests of strangers, to decide the issues upon the merits, and to arrive at your conclusion without regard to the effect, if any, your verdict may have upon the future welfare of the parties.

This is an action brought by the plaintiff, G. A. Pehrson, wherein he alleges that he suffered certain injuries which were caused by the alleged negligence of the defendant, Lauch Construction Company.

The negligence on which the plaintiff must rely for recovery is as to the use of a certain ladder. You have listened to the evidence presented here, and, I am sure, are well acquainted with the alleged act of negligence, and have it well in mind.

The defendant has filed its Answer in which it admits certain facts, but deny that there was any negligence on their part, and particularly, that any act of negligence contributed to or was the proximate cause of the plaintiff's injury.

As affirmative defenses the defendant alleges that the plaintiff's injury was brought about because of the plaintiff's own negligent acts, and further that he voluntarily assumed any risk.

The plaintiff has asked damages in the amount of \$100,000 for pain and suffering, \$220,000 for [216] loss of earning capacity and \$3,445.00 for hospital bills, physicians and surgeons' services, nursing, medicine, bandages, and other similiar services.

The defendant denies that they are liable to the plaintiff in this, or any other, amount.

This is only a brief summation of the pleadings, and is not to be considered by you as evidence in any sense.

In passing upon the issues in this case, you will bear in mind that the burden is upon the one who asserts the existence of a fact to establish it, and in a suit of this character to establish the fact by a preponderance of the evidence. By a preponderance of the evidence is not necessarily meant a greater number of witnesses, but a greater weight of the evidence. That is what the word "preponderance" means—evidence which convinces you that the truth lies upon this side, or that. It is that which is more convincing, more persuasive.

In this case the burden is upon the plaintiff in the first place to show by a preponderance of the evidence that the defendant was guilty of the negligence in the respect charged in the complaint, and

that the plaintiff has been damaged because of the defendant's negligence. [217]

This is an action for negligence against which the defendants defend upon the ground that they were not negligent, and, by way of an affirmative defense, upon the further ground of contributory negligence on the part of the plaintiff.

In determining this case you should first concern yourselves with determining whether or not the defendant has been guilty of the alleged negligence which was the proximate cause of the damages sustained by the plaintiff. If you find no negligence you need go no further and your verdict should be for the defendant

If you should find, however, the existence of such negligence as aforesaid on the part of the defendants, which was the proximate cause of the injuries, if any, sustained by the plaintiff, then your verdict should be for the plaintiff, unless you find that the injuries, if any, complained of by the plaintiff were contributed to by the negligence on the part of the plaintiff, and the extent of the consideration to be given by you to the plea of contributory negligence, as above referred to, will be found to be the subject of a later instruction.

Negligence may be defined as the performance of some act, the doing of some thing, which under the [218] circumstances a reasonably prudent and careful person would not do. You will see that it is a question of what ordinarily reasonably prudent

and careful persons, properly regardful of the rights of others, would do under the particular circumstances, or the converse. It is the leaving undone of something, some act, which such prudent and reasonably careful person would have done under the circumstances. It may be negligence of commission or negligence of omission.

By the phrases "reasonable care" or "ordinary care" as used in these instructions, is meant the exercise of that care and caution as would be exercised by a reasonably prudent person under the existing circumstances.

"Ordinary" or "reasonable" care are relative terms, and such care is proportionate to, and commensurate with, the danger involved; in other words, the greater the danger involved, the greater is the care required, although there is but one standard of care, and that is reasonable or ordinary care, as defined in these instructions.

Contributory negligence has been asserted as a defense in this case; by this plea it is meant that the plaintiff was negligent at the time of the accident in some of the particulars stated in the pleadings, which [219] negligence contributed to the injuries which he received. While the burden of proof ordinarily rests upon the defendant to prove by a preponderance of the evidence the plea of contributory negligence, nevertheless, you may also

consider the evidence adduced on the part of the plaintiff in determining whether or not the plaintiff was contributorily negligent, and whether that negligence was the proximate cause of his injury. Should you so find there could be no recovery in this case by the plaintiff. You will not consider this plea of contributory negligence unless you first find negligence on the part of the defendant.

The mere fact that the accident happened, considered alone, does not support an inference that some party or any party to this action was negligent.

A person may not cast the burden of his own protection upon another. Everyone owes to himself the duty of self-protection and the law will not permit one to close his eyes to danger and if injured thereby seek a remedy in damages against another, but he is bound to use his own intellect, senses and faculties for self-protection.

It was the duty of the plaintiff as the [220] architect of the building to make his inspections promptly and it was the duty of the defendant in the construction of said school building to take all necessary precautions for his safety while making such inspection.

You may take into consideration in this matter in arriving at your verdict the fact that the plaintiff has had about fifty years of experience as an architect in constructing and inspecting buildings and in the use of portable ladders and that because of that experience he was, or should have been, aware of and alert to apparent and obvious dangers incident thereto, and he was required to exercise the degree of care commensurate with his knowledge and experience that an ordinary prudent person possessing the same knowledge and experience would have exercised under the same or similiar circumstances.

It is a general rule of law that when one knows of a danger brought about by the negligence of another and understands and appreciates the risk therefrom and voluntarily exposes himself to such danger, he is precluded from recovery for resulting injuries.

In plaintiff's complaint, it is alleged that the defendant Lauch Construction Company was negligent in providing a ladder as a means of access to the roof of [221] the school building under construction in that the inadequate construction of the ladder and its position against the concrete ledge constituted and created a dangerous situation and a grave and serious menace and peril to the life and limb of the plaintiff while using said the only allegation that you are to consider. ladder as a means of access to the roof. This is

In this connection, if you should believe from the evidence that said ladder because of its construction and position against the building, did create a dangerous situation and a menace and peril to the safety of the plaintiff in using said ladder on September 12, 1952, but you further believe from the evidence that the plaintiff saw or knew, or by the reasonable exercise of his senses should have seen or known, and realized that the use of such ladder on that date as a means of access to the roof involved a danger or risk of injury to himself, then I instruct you that by voluntarily using said ladder on that date and exposing himself to such danger or risk of injury, the plaintiff assumed all such risk of injury and cannot recover in this action.

The defendant in this case was not an insurer of the safety of the plaintiff while upon the construction premises occupied by the defendant at Co-colalla, Idaho, but was required only to keep the premises and the [222] facilities provided and used thereon in such condition as an ordinarily prudent contractor under the same circumstances would deem reasonably sufficient for the safety of plaintiff and others upon the premises.

Such duty to keep the premises and facilities in reasonably safe condition applies only to defect or conditions which are in the nature of hidden dangers that are not known to one upon the premises and which would not be observed by him in the

exercise of reasonable care. One upon the premises, by invitation, express or implied, assumes all normal and ordinary risks attendant upon the use of the premises and the facilities thereon, and the occupant of the premises is under no duty to reconstruct or alter the premises and its facilities to obviate known or obvious dangers, nor is he liable for injury to one upon the premises from a danger which was obvious, or which should have been observed in the exercise of reasonable care.

If you should believe from the evidence in this case that the plaintiff's fall and resulting injuries, if any, were proximately caused by a defective or dangerous ladder upon the defendant's premises or in connection with the facilities used thereon, but you further find that such defective or dangerous condition or position of said ladder was an obvious one, or because of plaintiff's previous experience upon the premises, was as well known [223] to the plaintiff as it was to the defendant, then I instruct you that there can be no recovery in this action, and your verdict should be for the defendant.

Negligence is never presumed but must be proven, and it is possible, under the laws of the State of Idaho, for an accident to occur without wrongful acts on the part of either the plaintiff or the defendant.

Such an accident comes under the heading of an unavoidable accident, and if you find that neither the plaintiff nor the defendant were guilty of

such wrong conduct as would constitute negligence in this case, then I instruct you that the accident would be an unavoidable one, for which no one would be responsible, and that in such case your verdict should be for the defendant.

The opinion of experts is proper and competent evidence for you to consider, along with all the other evidence, facts and circumstances.

The weight to be given to the opinion of an expert is a question for the jury to determine, and you must determine what weight and credit you will give to any expert opinion the same as you are to determine what weight you should give to the testimony of any other witness in the case. [224]

You are the judges of the credibility of the witnesses and of the weight to be given to their testimony. That is your right and responsibility; not even the Court can deprive you of that right, or relieve you of the responsibility of determining the facts and passing on the weight and credibility of the testimony.

In determining the weight to be given the testimony of any witness you may take into consideration his or her interest in the case; his or her candor or frankness or lack of it, and also his or her qualifications to know and understand the matters about which he or she may testify.

If, under the evidence and these instructions, you find in favor of the plaintiff for personal injuries, and against the defendant, you are then to determine the amount of damages to be awarded. You should award him by way of special damages such amount as will reasonably compensate him for his expenses, including hospital and doctor expenses and loss of earnings, which he necessarily incurred because of his injuries, not exceeding the amounts set forth in the complaint.

In addition, you should award plaintiff such amounts as will reasonably and fairly compensate him for his permanent injuries, if any, and for the pain and suffering which he has endured and which he will with reasonable [225] certainty endure in the future. In arriving at the amount to be awarded him for his permanent injuries, if any, you are to consider the health and condition of the plaintiff before the injuries complained of, as compared with the plaintiff's present condition in consequence of said injuries; you should consider the nature and extent to such injuries, if any, the extent to which they will disable him in the future from performing his daily activities and the extent to which they will interfere with his normal enjoyment of life in the future. You are to allow such damages as in your opinion will be a fair and just compensation for the injuries and damages sustained, not exceeding the amount claimed in the complaint. The law does not provide any fixed standard by which pain, suffering and injuries, and compensation

therefore, are to be measured, but necessarily that depends upon your good sense, judgment and experience, based upon the evidence in this case.

You may also take into consideration that the life expectancy of one aged sixty-eight is 9.47 years.

If you do determine that the plaintiff is entitled to recover in this action, you should determine the amount by an open and frank discussion among your members, and you should not arrive at any amount to be allowed the plaintiff by each, stating the amount you [226] think should be allowed and then adding them together and dividing the total by twelve or by the number taking part in such method. This would be a quotient verdict and you should not, under your oath as jurors, arrive at any such verdict.

The fact that the Court has instructed you upon the rules governing the measure of damages is not to be taken by you as any indication on the part of the Court that it believes or does not believe that the plaintiff is entitled to recover damages. This instruction is given you solely to guide you in arriving at the amount of your verdict only in the event that you find from the evidence and instructions given you by the Court that the plaintiffs are entitled to recover. If from the evidence and instructions, you find that there should be no recovery you will then disregard entirely the instructions

that have been given you concerning the measure of damages.

Before there can be any recovery for injury, the plaintiff must prove negligence on the part of defendant as the proximate cause of such injury, and if you find from the evidence that the injury, if any, to plaintiff was the result of an unfortunate accident which ordinary prudence and care as hereinbefore defined to you could [227] not have prevented or guarded against, then plaintiff cannot recover, and your verdict should be for defendant.

You must weigh and consider this case without regard to sympathy, prejudice or passion for or against any party to this action; your decision must rest upon the evidence presented in this case. A very strong argument has been made for the plaintiff for sympathy. But if we allowed sympathy to influence us we would be violating our duty.

In this court it is necessary that your verdict be unanimous. When you go to your jury room you will elect one of your members as foreman and he or she will act for you in any further matters connected with this case. When you arrive at a verdict your foreman alone need sign the verdict, and it will be returned to open Court.

Verdicts have been prepared for your use, and I believe you will have no trouble in finding the verdict which correctly reflects your finding. If

you find in favor of the plaintiff you will insert in the blank on the correct verdict the amount you have determined to allow for damages. If you find in favor of the defendants and against the plaintiff, you will use the verdict which so [228] states.

I will excuse you for a moment while I take up a question of law with counsel.

The Court: You may register any exceptions to the instructions.

Mr. Towles: Your Honor, in doing this I wish to use some of the instructions that I have requested, that is in order to take the exceptions.

The Court: You can just point out your instruction by number and point out the question you are objecting or taking your exception to.

Mr. Towles: I think perhaps I could just turn these instructions over to the reporter for his copying them into the record without my reading the entire thing, that is without reading all the way through these requested instructions.

The Court: You may hand them to the Court Reporter and it may be understood that your exceptions to the instructions will be allowed—I think if there is just a portion of some instruction that I refused to give I will have to ask you to dictate that portion into the record.

EXCEPTIONS TO INSTRUCTIONS

Mr. Towles: Plaintiff excepts to the refusal of the Court to give the following instruction requested by the plaintiff:

“One. You are instructed that the defense [229] of assumption of risk is not available to the defendant in this case.”

Plaintiff excepts to the refusal of the Court to give instruction number two, which is as follows:

“Two. You are instructed that it was the duty of the plaintiff as the architect of the building to make his inspections promptly and it was the duty of the defendant in the construction of said school building to take all necessary precautions for the safety of persons lawfully on the premises; to erect and properly maintain at all times all necessary safeguards for the protection of persons rightfully on the premises; to allow plaintiff as the architect of said building to at all times have access to the work wherever it was in preparation or progress and to provide proper facilities for such access and for inspection and to at all times keep the premises free from accumulations of waste material or rubbish during the progress of the work.”

Plaintiff excepts to the refusal of the Court to give instruction number three, which is as follows:

“Three. You are instructed that Plaintiff was the architect of the school building. Plaintiff had the right at all times to have access to the work wherever it was in preparation or progress and

it was the duty of the defendant contractor to provide proper facilities for such access and inspection. At the time [230] of the accident in question plaintiff was engaged in the actual performance of his duty in inspecting the progress of the construction work on the school building. He was where he had a lawful right to be in the discharge of his duties to the school district. He was proceeding to reach the roof thereof by the only means furnished by defendant, to wit, a ladder, in order to inspect the roofing that was being laid by defendant on the roof planking. I instruct you that one who goes on premises for the benefit of the owner or occupant, or in a matter of mutual interest, or in usual course of business, or for performances of some duty is, by implication of law, an 'invitee' of the owner or occupant.

"Under such circumstances I instruct you that defendant was required to use reasonable care to protect plaintiff as an invitee of defendant by furnishing him with a reasonably safe place in which to perform his work of inspection, to provide proper facilities for access to the place upon or in said building to be inspected by him, and to furnish and maintain passageways, stairways, scaffolding, ladders and other appliances in connection therewith in a reasonably safe condition."

Plaintiff excepts to the refusal of the Court to give instruction number four, which is as [231] follows:

"Four. You are instructed that it was the duty of defendant construction company to comply with

all applicable provisions of federal, state and municipal safety laws and building codes to prevent accident or injury to persons on, about, or adjacent to the premises where the work was being performed.

“You are further instructed that the Industrial Accident Board of the State of Idaho was, under the statutes of the State of Idaho, empowered to adopt reasonable minimum safety standards and to make inspection in and about any place where workmen were employed; that pursuant to said statutory authority the said Industrial Accident Board adopted in 1947, Code 2, Idaho Minimum Safety Standards and Practices for the Building and Construction Industries, which said Code 2 acquired the force of law and became an integral part of the Workman’s Compensation Law of the State of Idaho, and that said Code was in force and effect at the time of the accident to plaintiff on September 12, 1952.”

Plaintiff excepts to the refusal of the Court to give Plaintiff’s Requested Instruction Five, as follows:

“You are further instructed that said Code in Part 1, entitled ‘General Requirements’ under the heading ‘Disposal of Waste Material’ in [232] Section 1.117 provides as follows:

“‘All scrap lumber, waste material, and rubbish resulting from the building construction shall be collected and removed, stored in neat piles, and not left to accumulate.’

and in Part IV, entitled 'Ladders' under the heading 'Portable Ladders' in Section 4.66 provides as follows:

“ ‘In the use of ladders from the ground, the lower end shall be placed on a solid footing to prevent it sinking into the earth.’

and in Section 4.67 provides as follows:

“ ‘If top of ladder is in danger of slipping or tipping, it shall be securely tied or fastened.’

“You are further instructed that under Part 1, Sec. 1.2, the Code makes the use of the word 'shall' in its provisions mandatory, and Part 1, Sec. 1.4, makes employers and employees jointly responsible for the observance of applicable codes and safety measures and for the posting of all necessary warnings and danger signs conspicuously located at all points of traffic and hazard for the protection of the public and workmen.”

Plaintiff excepts to the refusal of the Court to give Plaintiff's Requested Instruction Number Six, which is as follows: [233]

“If you find from the evidence that the ladder in question was installed by defendant at the time and place and in the position indicated by the evidence and that the defendant permitted waste material and rubbish resulting from the building construction to accumulate in and about the base of said ladder so that the lower end of said ladder was not placed on a solid footing, and if you further

find that the top of said ladder was in danger of slipping or tipping and that it was not securely or at all tied or fastened contrary to the provisions of the building and construction code aforesaid and that the violations thereof by defendant, or any thereof, contributed to the accident and were the proximate cause of the injuries complained of, then I instruct you that such violations were negligence per se, that is as a matter of law.”

Plaintiff excepts to the refusal of the Court to give Plaintiff's Requested Instruction Number Seven, as follows:

“You are instructed that if you find that the ladder in question was in danger of slipping or tipping, defendant was bound under the law to furnish to plaintiff a ladder at the time in question, the top of which was securely tied or fastened and safe to be used, and to keep and maintain the same in such condition at all times so as not to expose plaintiff to any hazard or risk.” [234]

The Plaintiff excepts to the refusal of the Court to give Requested Instruction Number Eight.

“You are instructed that in connection with the defense of contributory negligence, you are entitled to take into consideration the obligations imposed upon defendant by the code of minimum safety standards for the building and construction industry, all of which I have heretofore specifically pointed out to you, and whether or not the defendant had failed to perform any of said obligations which were the proximate cause of the accident in question. You may further take into consideration

the fact that the way provided by defendant, as a means of egress and ingress to the roof of the building from the ground and which the evidence shows was used by plaintiff and defendant's employees in order to reach the roof of said building from the ground, was the only way or means of access provided by defendant for plaintiff and its employees to reach the roof of said building, and further that the plaintiff at the time of the accident in question was acting in the performance of a duty imposed on him by the school district and the defendant itself and which was for their mutual benefit."

The Plaintiff excepts to the refusal of the Court to give Requested Instruction Number Nine.

"You are instructed that even though [235] you may believe from the evidence that the plaintiff knew of the condition of the ladder and the conditions surrounding it, and knew that said ladder and the manner in which it was being used created some danger, plaintiff's attempt to climb said ladder at the time and in the manner testified to is not necessarily contributory negligence, provided, that under all the facts and circumstances of this case, in making such attempt, he was exercising such due and reasonable care as persons of ordinary prudence would exercise under the same or similar circumstances, and if in fact the accident resulted from the negligence of the defendant."

Plaintiff excepts to the refusal of the Court to give the Jury Requested Instruction Number Ten.

"You are instructed that it is not negligence for

one to use an instrumentality known to be dangerous, if reasonably prudent men differ as to the propriety of encountering the danger. That an instrumentality in such condition and situation was used by others in the same manner and about the same time is relevant evidence to be considered by you in determining the question of due care on the part of the plaintiff." [236]

The Plaintiff excepts to the refusal of the Court to give Requested Instruction Number Eleven, as follows:

"You are instructed that one who voluntarily and unnecessarily assumes a position of danger, the hazards of which he understands and appreciates, cannot recover from a risk incident to the position, unless there is some reason of necessity or propriety justifying him in so doing. Exposure to known danger, however, only constitutes contributory negligence where it is a voluntary and unnecessary exposure to a dangerous instrumentality or condition, the perils of which are appreciated by plaintiff. If you find from the evidence that plaintiff took a risk in the performance of his duty, then I instruct you that that fact is entitled to great weight by you in determining whether plaintiff's conduct was negligent.

"The mere fact that a place is dangerous does not, in itself, deprive one injured of the right to recover where, by the exercise of care proportionate to the danger, one might reasonably expect to avoid the danger, or if reasonably prudent men might

differ as to the propriety of encountering it, or where the way used is the only way.”

The Court: Your exceptions are allowed. [237]

Mr. MacGillivray: We have no exceptions.

The Court: You may call the Jury.

The Court: The alternate juror, Mrs. Mayes, will now be excused. The bailiffs may be sworn. Ladies and Gentlemen, of the Jury, you may retire to consider your verdict. [238]

State of Idaho,
County of Ada—ss.

I, G. C. Vaughn, hereby certify that I am one of the official Court reporters for the United States District Court for the District of Idaho, and

I further certify that I took the testimony and proceedings given and had in the above-entitled matter in shorthand and thereafter transcribed the same into longhand (typing) and

I further certify that the foregoing transcript consisting of pages numbered to 238 is a true and correct transcript of said testimony and proceedings.

In Witness Whereof, I have hereunto set my hand this 31st day of January, 1955.

/s/ G. C. VAUGHAN,
Reporter.

[Endorsed]: Filed October 12, 1955. [239]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP) to wit:

1. Complaint.
2. Summons with Return attached.
3. Answer.
4. Minutes of the Court of Oct. 11, 1954, setting the case for trial.
5. Copy of Notice resetting the case for trial.
6. Judgment.
7. Bill of Costs.
8. Motion for New Trial.
9. Satisfaction of Judgment.
10. Order Denying Motion for New Trial.
11. Notice of Appeal.
12. Designation of Contents of Record on Appeal.
13. Appellant's Statement of Points.
14. Designation of Portions of Record to Be Printed.
15. Transcript of Testimony.
16. Exhibits Nos. 1 to 17, inclusive.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court this 25th day of October, 1955.

ED. M. BRYAN,
Clerk.

By /s/ LONA MANSER,
Deputy.

[Endorsed]: No. 14933. United States Court of Appeals for the Ninth Circuit. G. A. Pehrson, Appellant, vs. C. B. Lauch Construction Co., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Northern Division.

Filed November 7, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 14933

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Court of Appeals
For the Ninth Circuit

G. A. PEHRSON,

Appellant,

vs.

C. B. LAUCH CONSTRUCTION CO., a Corporation,
Appellee.

*Appeal from the United States District Court
for the District of Idaho,
Northern Division.*

OPENING BRIEF OF APPELLANT

FRANK FUNKHOUSER,
1329 Old National Bank Bldg.
Spokane, Washington

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Kellogg, Idaho
Attorneys for Appellant.

FILED
FEB 23 1950

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JURISDICTION

Jurisdiction arises out of diversity of citizenship (28 U. S. Code 1322).

The appellant is a resident and citizen of the State of Washington, and the defendant is a corporation organized under the laws of the State of Idaho.

The amount of the controversy exceeds three thousand dollars, exclusive of interest and costs.

This appeal is taken from Final Judgment entered October 22, 1954 and from an Order Denying Plaintiff's Motion for a New Trial entered August 30, 1955.

ASSIGNMENTS OF ERROR

1. The Court erred in striking from the plaintiff's complaint the allegations relating to waste material and rubbish.

2. The Court erred in refusing to admit Plaintiff's Exhibit No. 11.

3. The Court erred in refusing to give Plaintiff's Requested Instructions Nos. 2, 3, 4, 5, 6, 7 and 8.

4. The Court erred in not permitting School Director Hirst to testify.

STATEMENT OF FACTS

The plaintiff alleges plaintiff is a resident of the State of Washington, that defendant is a corporation organized under the laws of the State of Idaho.

That the controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

That the plaintiff is an architect of many years' standing, residing in Spokane, Washington, and duly licensed to practice his profession in the State of Idaho.

That plaintiff came to Spokane to take charge of the construction of the Davenport Hotel and has remained in Spokane since engaged solely in architectural work. This is plaintiff's first lawsuit. (89)

He was a strong and robust man (81), 5 feet 8 inches tall, weighs 168 pounds, was 68 years old September 12, 1952 (27), married, one daughter, not fitted for any other work. (27)

That on March 31, 1952, School District No. 82, in Bonner County, Idaho, entered into a contract with defendant for the construction of a six-room one-story brick school building, with frame, plank roof with composition roofing for the Cocolalla school area, (29) Prior thereto, plaintiff was employed as an architect to prepare plans and specifications for said building and to supervise its construction. (30)

He was a business invitee. (55-218) September 12, 1952, plaintiff and a school board member, Mr. Hirst, (Hurst) were inspecting said building. The main building roof was about 90% completed—walls up, roof planking was on, interior partitions going in (31), window frames in but not the glass (51), concrete walk not in. (51) Said Hirst asked plaintiff to inspect the roof, as the roof was not being laid in accordance with the terms of the contract. The only means of getting to the roof was to climb a 16 foot frame ladder (32), rungs 12 inches apart, to a concrete ledge forming a roof over the entrance to said building (32), said ledge being 15-1/3 feet from the ground at the time of the accident and projects from said building about 3 feet; a 3 foot 8 inch parapet concrete wall extended above the concrete ledge. In order to get from the concrete ledge to the roof of the main building one had to crawl (166), climb, boost oneself (196) or jump (182-193) over said 3 foot 8 inch concrete parapet wall. The standards of said ladder reached about a foot above said concrete ledge and the top rung of said ladder was about even with said ledge. Said ladder was not fastened in any way to the ledge of main building. (52) All the workmen used said ladder. Said ladder was to the left of said ledge, leaning against the main building. Rubbish and broken concrete blocks lay about the base of the ladder. (84) Said 16' ladder was too short. (109)

About 11:30 A. M. on said September 12, 1952, School Director Hirst proceeded up the ladder and on to the roof. When plaintiff started up the ladder its top was about 6 inches from and to the left of said concrete ledge (52), leaning against said main building. When he got to the top of the ladder he began to transfer his body from the ladder to the concrete ledge. Standing on the second rung from the top of the ladder, he took hold with his left hand the top of the parapet wall, he moved his right knee over on the concrete ledge, and in getting his balance from the ladder to the ledge, as he had done several times previously, the ladder began to move to the left, his finger tips began to slip from the concrete parapet wall and he fell to the ground (33), a distance of 15'4" (44), on top of broken concrete blocks. Said plaintiff suffered a fracture of the right femur, a fracture of the collar bone, two broken ribs, and other painful bruises and contusions and, as a result, plaintiff was confined to the hospital and his home until February 12, 1953, and has been under the doctor's care since. (81) It was necessary to insert a metal plate 6 inches long, $\frac{1}{4}$ inch thick and $\frac{5}{8}$ inch wide, and a metal bolt $\frac{6}{16} \times 3$ inches was screwed into his hip joint with four screws about 2 inches long, while the fractured clavicle was reduced by means of an open reduction and held in position with a figure eight stainless steel wire bolted to the base. (123) Said injuries are permanent. (129)

When defendant was examining his second witness the Court struck from plaintiff's complaint any allegation of negligence which alleges that the premises were not free of waste material and rubbish. (153)

Said school board member was unable to be in court during the time plaintiff's evidence was given (58), which was concluded just before closing time the second day of trial, and plaintiff rested. Said board member was available immediately when court opened the following morning. The Court did not permit him to testify. (143)

At the time of his injuries and for a long period prior thereto, plaintiff's annual earnings were approximately \$20,000.

By reason of the matters and things hereinbefore alleged, plaintiff has been damaged in the sum of \$100,000 on account of pain, suffering and injuries that he has suffered and will continue to suffer, and a loss of earnings from his profession in the sum of \$18,000 annually. (83)

WHEREFORE, plaintiff prays judgment against said defendant for the sum of \$323,500 and for costs and disbursements herein sustained.

ARGUMENT No. 1

Defendant was negligent and careless in failing to keep the premises free from accumulations of waste

material and rubbish, particularly in and about the base of said ladder, during the process of the work.

Plaintiff rested and while defendant was examining their second witness, like a clap out of the clear, the Court halted proceedings and struck from the complaint the allegations regarding rubbish and waste material lying about the building and around the ladder. (153) After hearing various witnesses testify, it is not at all understandable why the Court would have stricken this allegation from the complaint.

The Court heard plaintiff testify:

“Will you pull me off this pile of rubbish?”
(58)

“The ground, as I previously stated, had been filled up to a certain height from material from the excavation. On top of that it made a sort of little hill or a raised portion at the point where the ladder stood. Back of the ladder, particularly along there, was piled some rubbish, some broken boards, and some broken concrete blocks and also some cuttings, and some of those boards were also in front of the ladder, so that when you were ready to climb up the ladder you had to step on some of the boards. And I will have to state here that I don’t believe that at any time I saw the exact position of the two standards of the ladder. The ground in there was so filled up with short pieces of lumber and rubbish that I don’t think at any time that I saw the two standards of the ladder on any particular part of the ground there. That pile was just rubbish and was intended to be hauled away.” (87)

"I cannot answer that its was solidly on the ground. As I said on my direct examination the ground was covered with rubbish and some material there and it was hard to see it (the ladder)." (95)

"I fell on a pile of rubbish." (115)

The Court heard defense witness Van Slike testify as follows: (150-151)

"Q. I will ask this: Did you notice any rubbish or broken concrete blocks about the bottom of this ladder, on the day in question?

A. The usual amount of junk lay around. (150)

Q. Do you recall whether this waste material had been there for any considerable period of time, or all during the construction, or was it just that day, or what?

A. I believe that they had cleaned up the mess that the bricklayers had made.

Q. Had this particular rubbish been there very long, to your recollection?

A. Not to my recollection." (151)

Henry George, a Spokane contractor, who has been in the construction business forty years, just finished the Spokane Coliseum and has built over one hundred million dollars worth of buildings, was called as plaintiff's expert witness.

The Court heard him testify:

“Rubbish, broken tile, etc., are not allowed to accumulate around the base of ladder and around the building.” (71)

The Court heard testimony of plaintiff's expert witness, R. C. Wurst, another building contractor: (75)

“We keep the rubbish away from the building and normally piled up away from the building and we normally haul it off when it accumulates in a truck load.”

These broken concrete blocks had been in and about the base of the ladder a considerable length of time or had been hauled there the forenoon in question, to-wit: September 12, 1952. The building was far past the place of using concrete blocks. The building was 50% completed—roof planking was on, the walls were up, interior partitions going in. (31) The contractors were working on the roof. (145)

How else but falling on broken concrete blocks could plaintiff Pehrson have sustained such severe injuries.

ARGUMENT No. 2

The defendant was negligent and careless in failing to furnish plaintiff a ladder to safely reach the roof of the building where immediate inspection was imperative on the morning of September 12, 1952,

the date of the accident. The overall height of the building was 19 feet on that date (15'4" from the ground to a concrete ledge over the entrance of the building and 3'8" from the ledge to the top of a concrete parapet wall). (36) In other words, the defendant, through his disregard for the safety of those who must go on the roof, compelled them to get over a 19 foot concrete wall with a 16 foot ladder. To get to the 15'4" concrete ledge with a 16 foot ladder was dangerous because it must stand too straight. A ladder, to be safe, should be off one-fourth of its height from the perpendicular. (109) Therefore, to get safely over a 19 foot wall, the ladder should be approximately 20 feet long. True, by crawling over, climbing over or jumping over the 3'8" wall, one ordinarily would succeed in reaching the roof. The ground about the base of the ladder was so covered with rubbish and broken concrete blocks it was difficult to see the base of the ladder or adjust it. (95) (87)

The Court erred in refusing to give Instructions Nos. 2 and 3 wherein it was stated that defendant should furnish adequate facilities for the plaintiff to make proper inspections of the building. The ladder was not fastened to the wall in any way.

The aforesaid Henry George, an expert witness for plaintiff, testified that ladders should be tied at the top and bottom, (71) and long enough to be safe to go to the point you want to get to. (71)

R. C. Wurst, expert witness for the plaintiff, testified ladders should be sufficient to reach the top of the building without difficulty, or where you intend to go on the building. (75)

ARGUMENT No. 3

The ladder was not fastened to the wall or ledge in any way. (52) The Court refused to admit plaintiff's Exhibit No. 11.

“Mr. Towles: Your Honor (30) I am going to offer in evidence Plaintiff's Exhibit Number Eleven, which is the Idaho Minimum Safety Standard and Practices for the Building and Construction Industry—Code #2, Adopted September 15, 1947, by the Industrial Accident Board of the State of Idaho. In connection with these safety regulations, they were adopted by the Board pursuant to Sec. 72-1101 of the Idaho Code which authorized the Board to adopt reasonable, minimum safety standards, to make inspections in and about any place where workmen are employed. We have had these regulations certified by the Secretary of the Industrial Accident Board and the authority in connection with these safety standards is——” (53)

“The Court: Just offer it, Mr. Towles, and see if there is any objection. I am wondering if there is any more reason to put this in evidence than there would be to put the statutes or code of the state in. Isn't it a question of law that the Court takes judicial notice of in instructing the jury? It is just a little unusual to introduce the law in evidence, usually the court takes care of the law. However, if there is no objection, I will admit it, of course.”

“Judge Hawkins: I do have objection to this. However, I didn’t want to rise and tell Mr. Towles until he had finished. (31)

“The Court: What is your objection, Judge Hawkins?

“Judge Hawkins: I have a number of reasons to object to this, your Honor, first, it is a promulgation of rules and regulations put out by the Industrial Accident Board regulating the conditions of employment between an employer and an employee, a situation which is remote entirely from the obligations that this defendant, the construction company, may have had to an independent architect who was going on the property in behalf of the school district and who was not an employee of the defendant, and upon which he is attempting to impose conditions which are recited by the Industrial Accident Board in an employer-employee relationship. Our position is that the common law applies to this case but not regulations that are adopted by the Industrial Accident Board, the statute is quite clear on that. It is the working conditions that are here prescribed.

That is the fundamental objection to it. This man is an independent architect who has come in here and he does not hold any employer-employee relation. Likewise, if you are going to rely on official reports they have not complied with Section 9-317 that they plead the report or make it available in advance—it comes as a complete surprise, it has never been (32) pleaded in the pleadings and we have never had a chance to answer or allege the position of the defendant. If any reliance is had on a report of this kind it must be pleaded and made available and a copy

supplied to the adverse party a reasonable time before the trial and that has not been done in this instance, but the principal thing is that the purpose of these regulations is to protect the employer-employee relationship and not one in the position Mr. Pehrson finds himself, going in as a licensee to make an inspection of the premises under an independent contract."

"Mr. Towles: I think you are mistaken about his being a licensee, he was a business invitee on these premises. He was there because he had a right to be there."

"The Court: Don't you agree with me, Mr. Towles, that this is a question of law for the court to determine in giving his instructions to the jury under the evidence here? Is there any more reason to introduce that book than there would be to introduce the statutes that authorize it?"

"Mr. Towles: I think so, because your Honor has to know what is in this."

"The Court: But I am supposed to know that, Mr. Towles. (33)"

"Mr. Towles: If your Honor can take judicial notice of this——"

"The Court: ——I have always taken judicial notice of the laws of the State of Idaho or any document which is a part or authorized under the laws of the State of Idaho, I have always taken judicial notice of that and I have always taken care of it in my instructions to the jury. Perhaps this was not covered by the objection

made but it seems to me — I have no doubt but what this matter has no more purpose here in this record than if you introduced the sections of the statutes that authorized it.”

“Mr. Towles: Then I understand your Honor takes judicial notice of this sort of thing?”

“The Court: Yes, I do.”

“Mr. Towles: And they become a part of the law.”

“The Court: That is the way I understand it. Does counsel have any objection to that ruling of the court?”

“Judge Hawkins: I have this objection, that the book is promulgated for an entirely different purpose.”

“The Court: I understand (34) that, but isn’t that a matter for me to consider after the evidence is in and in preparing the instructions to this jury?”

“Judge Hawkins: Without the benefit of that pamphlet, that is true and of course, it wasn’t in the pleadings either.”

“Mr. Towles: It wasn’t necessary to plead the law in the pleadings.”

“The Court: In order to hurry this matter along, I will take it under advisement, but my present thought is that I will not admit this book, but if I do decide to allow it in evidence I will rule on that later.”

“Mr. Towles: We have alleged in this complaint that ladder was not securely fastened and we have alleged other general grounds of negligence.”

“The Court: I will look over the pleadings and I will rule on it later.” (57)

The Court not only refused to admit plaintiff's Exhibit No. 11. It also refused to give Plaintiff's Requested Instructions Nos. 3, 4, 5 and 6, all hearing on said Exhibit No. 11.

We wish to emphasize Plaintiff's Requested Instruction No. 5:

“You are further instructed that said Code in Part I, entitled ‘General Requirements’ under the heading ‘Disposal of Waste Material’ in (232) Section 1.117 provides as follows:

“‘All scrap lumber, waste material, and rubbish resulting from the building construction shall be collected and removed, stored in neat piles, and not left to accumulate.’

and in Part IV, entitled ‘Ladders’ under the heading ‘Portable Ladders’ in Section 4.66 provides as follows:

“‘In the use of ladders from the ground, the lower end shall be placed on a solid footing to prevent it sinking into the earth.’

and in Section 4.67 provides as follows:

“‘If top of ladder is in danger of slipping or tipping, it shall be securely tied or fastened.’

“You are further instructed that under Part I, Sec. 1.2, the Code makes the use of the word ‘shall’ in its provisions mandatory, and Part I, Sec. 1.4, makes employers and employees jointly responsible for the observance of applicable codes and safety measures and for the posting of all necessary warnings and danger signs conspicuously located at all points of traffic and hazard for the protection of the public and workmen.”

Courts have invariably held that every person violating a statute is a wrongdoer, negligent in the eyes of the law, and that any innocent person injured by such violation if it be the proximate cause of the injury, may, in a proper case, receive from employer or contractor appropriate damages. If anyone upon whom the statute imposes a duty violates that duty and violation results in an injury, he is liable.

DECISIONS

The general rule supporting our contention is stated in 65 C.J.S. §19, page 418. We quote:

“The generally accepted view is that violation of a statutory duty constitutes negligence, negligence as a matter of law, or negligence per se.”

On page 420, §19, 65 C.J.S., we read:

“The rule that violation of a statute is negligence per se has been applied with respect to statutes covering a large variety of subjects, among which may be mentioned building codes”

Further on page 420 we read:

“Violation of a municipal ordinance designed for the protection of the person claiming to be injured by reason of such violation is usually considered as negligence per se or negligence as a matter of law.”

We would not begin to quote from all the decisions mentioned in the various states named. The following, we believe, are sufficient to sustain our contention:

Idaho Code, Sec. 72-1101.

Pursuant to said statutory authority said Board adopted in 1947 Code 2, Idaho Minimum Safety Standards and Practices for the Building and Construction Industries which is still in effect.

Said Building Code acquired the force of law and became an integral part of the Workmen's Compensation Law of the State of Idaho.

Carron v. Guido, 54 Idaho, 494; 33 P. (2d) 345 at 347. In this case a young boy was shot. The seller of the ammunition made the sale in violation of state statute and was joined. The Court said:

“The violation of a law intended for the protection of a person *and others like situated*, which results in his injury and is the proximate cause of it, is negligence per se.” (emphasis added)

This language indicates at least that even if Pehrson was not in the class directly protected, he was at least "like situated" as an employee of the School Board.

Pittman v. Sather, 68 Idaho, 494, 188 P. (2d) 600 at 606.

In this case a road contractor left a pile of rock on an unfinished highway. It was not lighted nor were there any barricades. The Court said:

"Negligence per se is the violation of a statutory duty, or is such negligence as appears so opposed to the dictates of common prudence that a Court can say as a matter of law, without hesitation or doubt, that no careful prudent person would have committed."

Brixey v. Craig, 49 Idaho, 319, 288 P. 152, 154 involved a violation of the automobile code. The Court said:

"The Court has frequently held that for one to violate a positive statutory inhibition is negligence per se, and not merely prima facie evidence of negligence. We do not question that rule."

Smith v. Oregon Short Line R. Co., 32 Idaho, 695 187 P. 539.

In this case there was an accident at a railroad crossing. There was evidence that the train did not ring a bell contrary to the provisions of an Idaho statute. The Court said:

“The failure to conform to that statute has been held repeatedly to be negligence per se.”

See also *Curoe v. Spokane and I.E.R. Co.*, 32 Idaho, 643, 186 P. 1101

Frazier v. Northern Pacific Ry. Co., 28 F. Supp. 20, 23 (1939).

A train was traveling at a rate of speed in excess of a municipality ordinance. A boy was hit and killed.

The Court held:

“Of course an ordinance is as much a law within the limits of a municipality as a state statute, and is intended to protect persons and a violation thereof which results in injury and is the proximate cause of it is negligence per se as recognized by the Supreme Court of Idaho.”

Lilly v. Grand Trunk Western R. Co., 317 U.S. 481, 87 L. Ed. 411, 417, 63 Sup. Ct. 347, where it was held that a rule adopted by the Interstate Commerce Commission in the exercise of the Commission's authority in fixing the standards of safety required under the Boiler Inspection Act, acquires the force of law and becomes an integral part of the Act, to be judicially noticed.

In the case of *Osborne v. Salvation Army*, 107 F. (2d) 929, Augustus Hand said:

“In respect to the first defense, there is much reason for saying that a man who was given board and lodging upon the understanding that he

would do work about the building, which might be assigned to him, was 'working for another for hire' and hence when he performed services for the defendant became an employee, as defined by Section 2(5) of the Labor Law. But the statute would seem to apply even if he was not 'working for hire.'

"In spite of the fact that the Labor Act in general deals with matters arising out of the relation of master and servant, Section 202, in terms embraces all window cleaners, whether employees of the 'owner, lessee, agent, manager or superintendent' in charge of a building or not and has not been construed by the courts as limited to employees of the person charged with liability but has been treated as covering any person cleaning windows of a public building from the outside.

"Moreover, it seems quite unlikely that a laborer, even if not technically hired to clean windows, should not have the protection of safety devices, when we consider the purposes and broad language of the statute. We think that the plaintiff was within the class for whose protection Section 202 of the Labor Law was enacted and was entitled to a verdict in his favor unless the defendant had a defense of assumption of risk or contributory negligence. The better reasoned decisions have held that assumption of risk and contributory negligence, which the trial judge allowed to go to the jury, are not valid defenses in cases where the violation of a statute enacted for the benefit of a class of which the plaintiff is a member is involved. If the plaintiff's injuries arose from the violation, defendant's liability was absolute irrespective of any proof of negligence."

See U. S. Supreme Court case in *Brady v. Terminal Ry. Assoc.*, 303 U.S. 10; 82 L. Ed. 614 (1938). Plaintiff was employed by the Wabash Railroad to which Terminal was delivering a car. His duty was to inspect the car by the Wabash. He sued under the Safety Appliance Act which, of course, is for the purpose of protecting employers. The Court held at 14-15, 618:

“In the instant case, petitioner in the course of his duty would have occasion to go upon the car and use the grabiron, and accordingly the benefit of the statute would extend to him, although he was not employed by the carrier holding the car in use, unless he was outside the scope of the statute because of the special character of his work. His work was that of inspection to discover defects of the sort here found to exist as well as others.”

Under similar circumstances the Sixth Circuit said in *Fort Street Union Depot Co. v. Hillen*, 119 F. (2d) 307 at 312:

“The fact that certain classes of persons were intended to be primarily protected by the discharge of a statutory duty will not necessarily prevent others, neither named nor intended to be named as primary beneficiaries, from maintaining an action to recover for injuries caused by the violation of such legislative command. (cites) The Act is remedial and humanitarian in purpose and calls for appropriate liberal construction.”

Pacific States Lumber Co. v. Barger (9th Cir. 1926), 10 F. (2d) 335. It is cited in *McKay v. Pacific Bldg. Materials Co.* (S. Ct. Ore. 1937), 68 P. (2d) 127.

In the *McKay* case the defendant was not an employee of either defendant construction company but was employed on the premises. The Court said at 133:

“Defendants urge that the provisions of the Employees Liability Act are not applicable to this case, because plaintiff was not an employee of defendants or either of them. In an opinion by Judge McCamant, a former member of this Court, the United States Circuit Court of Appeals for the Ninth Circuit say (sic) :Every employer whose work involves work or danger is required by the statute to take the required precautions, not only for the protection of his own employees, but also for the protection of employees of others whose duties bring them within reach of the dangers and risks of such work. The Supreme Court of Oregon has so construed the Statute, and this construction is binding on the federal court. (citations) *Pacific States Lumber Co. v. Barger*, 10 F. (2d) 335, 336.”

See also *Coomer v. Supple Inv. Co.* (S. Ct. Ore. (1929), 274 P. 302. Here the plaintiff was an employee of a supplier to the defendant construction company.

There is a New York case involving a ladder, and, curiously enough, a school. This is *Koenig v. Patrick Const. Corp.* (Ct. App. N.Y. 1948), 83 NE (2d) 133. Plaintiff was an independent contractor hired to wash

windows of a school defendant was building. He fell from a ladder. At 133 "Plaintiff, seriously injured, commenced this suit for damages predicated primarily upon defendant's asserted failure to comply with the requirements of Section 240 of the Labor Law."

At 134:

"Irrespective of how the courts may once have viewed the question (citations), it is our judgment that both sound reason and persuasive decisions, involving statutes whose content and purpose are similar to those of Section 240, require the conclusion that the statute does not permit the worker's contributing negligence to be asserted as a defense."

Defendant's superintendent, Mr. Lyle Richardson, was permitted to testify that he had never had any conversation at any time with any person concerning the condition of the ladder. (164) The following took place on the rebuttal:

By Mr. Therrett Towles:

"Q. Mr. Pehrson, did you have a conversation with Mr. Richardson, the Superintendent at that building, with reference to the situation as to where this ladder was located?

A. Yes.

Q. How long before the accident was this?

A. I would say about a week previous.

Q. What did you say to Mr. Richardson?

Judge Hawkins: Now I object to this. This certainly is a part of their case in chief. He had this conversation and it was known at the time they were putting on their case in chief and we will object to it as not proper rebuttal. We could go back over all of the evidence if this is allowed.

The Court: The objection is sustained." (216)

We feel the Court erred in sustaining defendant's objection.

The ground on which the ladder rested was a rough, uneven excavation and, therefore, the ladder could not sit on anything but rough, loose soil and rubbish, which plaintiff had to jump or climb over to get to the ladder. Because the defendant failed to furnish plaintiff proper facilities to do this work, plaintiff is a victim of the carelessness of said contractor and is a cripple for life due to said negligence.

ARGUMENT No. 4

The Court erred in refusing to permit School Director Donald Hirst to testify. As our supporting affidavits for a new trial stated, said Hirst was advised the case would not go to trial in the October 1954 term. Said case did not appear on the October docket. Said Hirst was ready to testify the following morning, after plaintiff rested. Defense had not made their opening statement.

"Material testimony ought not to be rejected because offered after the evidence is closed on

both sides, unless it is kept back by trick and the opposite party would be deceived or injuriously affected by it.”

Wigmore, Vol. 4, page 10, §1867.

Did movant use reasonable diligence to procure the attendance of the witness?

39 Am. Jur. §37, page 57;

66 C.J.S. §96b, page 278;

46 C.J. §195(2), page 234.

We respectfully submit that it has been definitely established that the architect, plaintiff herein, was under a contract with the owner and was compelled to be on the Project to perform his duties, and we believe from the cases cited that he should be entitled to the benefit of the Idaho statutes and regulations as set forth in the complaint.

Respectfully submitted,

FRANK FUNKHOUSER

JAMES G. TOWLES

Attorneys for Appellant.

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

G. A. PEHRSON,
vs.
C. B. LAUCH CONSTRUCTION CO.,
a Corporation,

Appellant,
Appellee.

No. 14933

*Appeal from the United States District Court
for the District of Idaho,
Northern Division.*

APPELLEE'S BRIEF

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KERSHAW'S, INC.

FILED

MAR 20 1956

PAUL P. O'BRIEN, CLERK

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C. B. LAUCH CONSTRUCTION CO., a Corporation,	<i>Appellee.</i>		

*Appeal from the United States District Court
for the District of Idaho,
Northern Division.*

APPELLEE'S BRIEF

JURISDICTION

Appellee accepts the jurisdictional statement of
appellant.

RESTATEMENT OF THE CASE

Appellant's statement is more a recitation of the allegations of his complaint than a statement of the evidence in the record and is entirely insufficient for review of the questions involved on appeal. For that reason a restatement of the evidence is necessary.

In November, 1951, appellant, an architect, was employed by School District No. 82, Bonner County, Idaho, to prepare plans and specifications for, and to supervise construction of, a school building at Cocolalla, Idaho (Tr. 28, 29). In May of 1952 the school district and appellant construction company entered into contract for construction of the building and work was immediately commenced (Tr. 89, 90, 152, 153). Under his contract of employment as architect, appellant was required to, and did make weekly inspections of the building as construction progressed (Tr. 30-31, 90).

Appellant had practiced his profession as an architect for 50 years (Tr. 87) and in that time supervised the construction of sixteen hundred to two thousand buildings (Tr. 88). On building inspections he had used portable ladders on thousands of occasions and was thoroughly familiar with the use of all types of ladders and the problems encountered in such use

(Tr. 89). He had sustained six or seven previous falls from loss of balance in using ladders with resulting injuries (Tr. 89).

On September 12, 1952 appellant, in company with Mr. Hurst, a school district director, visited the construction site for inspection (Tr. 32). After completing inspection within the building appellant was requested by Hurst to inspect the roof (Tr. 32, 98). Access to the roof was had by means of a sixteen foot portable ladder of solid construction (Tr. 98, 157). Procedure was to climb the ladder, step off onto a three foot concrete ledge or canopy over the main entrance to the building, and then step over a three foot eight inch parapet wall onto the roof. The ladder was used in this fashion by laborers on an average of fifty times a day (Tr. 145, 146, 157-161, 166-168, 175, 187-189, 195, 196, 201). Appellant had used this ladder as access to the roof on ten to fourteen previous occasions (Tr. 92-94, 107, Ex. 13).

On September 12 Mr. Hurst first ascended the ladder and stepped off onto the roof (Tr. 32, 99-100). As Hurst ascended appellant stood on the ground, his left hand resting on the ladder (Tr. 99). When Hurst stepped off the ladder, appellant felt it shift to the left about two inches at the bottom and four to six inches at the top (Tr. 101). Although appellant realized the probability of trouble if the ladder was off balance, he immediately started up the ladder with-

out taking even the simplest precaution to see if the ladder standards were solidly set on level ground and securely set against the building or if in danger of further shifting (Tr. 101-116, Ex. 13). As appellant stepped off the ladder to the ledge, the ladder shifted again and appellant lost his balance and fell, sustaining injury (Tr. 33).

Customary precaution in construction work requires a check to see that a portable ladder is solidly set before ascending (Tr. 146, 147, 161, 167, 178, 192, 202, 207-208, 211). Appellant was familiar with this simple but necessary precaution (Tr. 94-95) but failed to exercise it (Tr. 101-116). Appellant was admittedly and voluntarily subjecting himself to danger in ascending a ladder not solidly set upon the ground or against the building (Tr. 110-113). In failing to exercise any precaution for his own safety, appellant admits that he knowingly "took a chance" that accident and injury would not result (Tr. 102, 108, 113).

It is for the injury sustained as a result of his failure to exercise any precaution for his own safety and in voluntarily taking a chance by subjecting himself to a known danger that appellant seeks recovery in this action. The District Judge reluctantly denied appellee's challenge to the sufficiency of the evidence (Tr. 143) and motion for directed verdict (Tr. 218) and then denied appellant's motion for new trial upon the ground that the evidence conclusively shows ap-

pellant to have been guilty of contributory negligence as a matter of law (Tr. 21-22).

ARGUMENT

ANSWER TO SPECIFICATION OF ERROR NO. 1

Appellant complains of the trial court's action in withdrawing from the jury an allegation of negligence on account of the accumulation of waste material and rubbish on the construction site (Tr. 153). No contention is made that a pile of rubbish caused appellant's fall. It is only contended that appellant's injuries *might* not have been so severe had he not landed on a pile of debris containing some broken concrete blocks (App's. Brief 8). Unused and waste construction materials do gather about a construction site and are hauled away when sufficient accumulates (Tr. 76). Appellant admitted that the debris on which he fell "was just loose rubbish of the usual type that you find around construction jobs that had been gathered in one pile for disposal" (Tr. 115).

There is in the record no evidence that appellee had violated any established construction practice in this regard, no evidence that the debris complained of was a proximate cause of appellant's fall, and no evidence, as appellant infers, that it had been allowed to accumulate for an unreasonable length of time. The trial court's action in striking the allegation was correct.

ANSWER TO SPECIFICATION OF ERROR NO. 2

Error is assigned on refusal of the trial court to admit appellant's Exhibit 1, a copy of the Idaho Minimum Safety Standards and Practices for the Building and Construction Industry adopted by the Industrial Accident Board of the State of Idaho. The offer was rejected upon the ground that the court would take judicial notice of the contents of the exhibit as a part of the law of the State of Idaho and such ruling then met with the apparent approval of counsel for appellant (Tr. 54-56, 141). The trial court can and should take judicial notice of whatever is established by law and of the public and private official acts of the legislative, executive and judicial department of the State of Idaho and of the United States. *Idaho Code*, Section 9-101; *McFall v. Arkoosh*, 37 Idaho 243, 215 Pac. 978; *Incas v. Union Pacific Railroad Company*, 72 Idaho 390, 241 Pac. 2d 1178; *Standard Oil of California v. United States*, 107 F. 2d 402 (Ninth Circuit); *Milwaukee Mechanics' Insurance Co. v. Oliver*, 139 F. 2d 405 (Fifth Circuit).

ANSWER TO SPECIFICATION OF ERROR NO. 3

Error is assigned on the trial court's refusal to give plaintiff's requested instructions Nos. II, III, IV, V, VI, VII and VIII. Appellant's brief contains no argument or citation of authorities in support of any alleged error in the refusal of the trial court to sub-

mit his requested instructions.

Nor are the instructions set forth *totidem verbis* as required by Rule 20 (2) (d) of Rules of this honorable Court.

An assignment of error relating to instructions is deemed abandoned where assignment is not argued or discussed in the brief. *Moore v. Tremelling*, 100 F. 2d 39 (Ninth Circuit); *Forno v. Coyle*, 75 F. 2d 692 (Ninth Circuit); *Mutual Life Insurance Company v. Wells Fargo Bank and Trust Company*, 86 F. 2d 585 (Ninth Circuit); *Bank of Eureka v. Partington*, 91 F. 2d 587 (Ninth Circuit); *Hayward v. Yost*, 72 Idaho 415, 242 Pac. 2d 971; *Gough v. Tribune-Journal Co.*, 75 Idaho 502, 275 Pac. 2d 663.

Appellant's requested instruction No. 5, quoted on page 14 of his brief, was properly refused as it contains reference to the collection and storage of waste material, an issue withdrawn from the jury's consideration and because the provisions of the Idaho Minimum Safety Standards and Practices are not applicable to this case.

Idaho Code, Sec. 72-1101 empowered the Industrial Accident Board to "adopt reasonable minimum safety standards * * * to render employees and places of employment safe." The standards adopted are for the protection of workmen and create reciprocal duties as between employers and employees. The standards adopted pursuant to the statute do not purport to

create any statutory duty as between employers and the general public. The duties existing as between the employers and the general public are those required by common law. As to the duties required of the appellee by the common law in this case, the jury was properly instructed that "it was the duty of the plaintiff as the architect of the building to make his inspections promptly and it was the duty of the defendant in the construction of said school building to take all necessary precautions for his safety while making such inspection." (Tr. 224)

As the safety standards and practices adopted create no new duty on the part of employers toward the general public and as the appellant Pehrson was not an employee of the class for whose protection the standards were adopted, he cannot assert a claim of liability based on an alleged violation of such standards.

"In every case in which a statute makes it the duty of individuals or corporations to do or refrain from doing something for the benefit, advantage, or protection of others, an injured person complaining of a neglect of the statutory duty must, in order to maintain an action for damages, be a member of the class which the statute was enacted to protect. Only those for whose benefit and advantage the law was made have a right of action for injuries consequent upon its violation." 38 *Am. Jur.* 835 and cases cited.

Part I, Sec. 1.4 of the Idaho Minimum Safety Standards and Practices makes "employers and employees jointly responsible for the observance of the applicable codes and safety measures." Apparently the provisions of the safety standards and practices which appellant deems material are those appearing in Sections 4.66 and 4.67 of Part IV under the heading "Portable Ladders": to the effect that "In the use of ladders from the ground, the lower end shall be placed on a solid footing to prevent it sinking into the earth" and "If top of ladder is in danger of slipping or tipping, it shall be securely tied or fastened."

It is obvious that these two sections pertain more directly to employees engaged in the actual performance of work and in the use of portable ladders than to employers acting only in a supervisory capacity. Consequently, if appellant maintained a position similar to that of a workman or employee and if the safety standards are applicable in this case it must be held as a matter of law that appellant's admitted violation of the sections referred to constituted negligence on his part barring any recovery.

ANSWER TO SPECIFICATION OF ERROR NO. 4

Appellant assigns error on refusal of the trial court to permit a reopening of his case to permit the witness Hurst to testify (Tr. 143). The proffered testimony of the witness Hurst was merely cumulative of that given by appellant (Tr. 215).

The denial of a motion to reopen the case for introduction of further testimony is within the discretion of the trial court and his action will not be reviewed except in case of manifest abuse of that discretion. *Gardner v. United States*, 71 F. 2d 63 (Ninth Circuit); *Froman v. First National Bank*, 35 Idaho 10, 204 Pac. 145; *Hall v. Jensen*, 14 Idaho 165, 93 Pac. 962.

It is within the discretion of the trial court to admit or reject evidence that is merely cumulative. *Christian v. Waialua Agr. Co.*, 93 F. 2d 603 (Ninth Circuit); *Sommer v. Carbon Hill Coal Co.*, 107 F. 230 (Ninth Circuit).

APPELLANT GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW

By proper instructions to which no exceptions were taken, the law of the case was established. The law does not permit appellant to close his eyes to danger and if injured thereby seek a remedy in damages against another (Tr. 224). If appellant knew, or in the exercise of care should have known and realized, that the use of the ladder because of its construction and position against the building involved a danger or risk of injury to himself, then by voluntarily exposing himself to such danger or risk of injury, appellant assumed the risk and cannot recover (Tr. 226). The duty to keep premises reasonably safe applies

only to defects or conditions that are in the nature of hidden dangers and if condition and position of the ladder was obvious or as well known to appellant as to appellee, there could be no recovery (Tr. 226-227). The appellant was required to exercise a degree of care commensurate with his knowledge of dangers incident to the use of portable ladders (Tr. 225).

Regardless of the propriety of any ruling of the trial court during the course of trial, it must be held that under general rules of law and particularly under the law of this case as established by the court's instructions, that the appellant assumed the risk or danger of injury complained of and was guilty of negligence as a matter of law. Such was the final ruling of the trial court (Tr. 21-22).

"It is a general rule of law that when one knows of a danger brought about by the negligence of another, and understands and appreciates the risk therefrom and voluntarily exposes himself to such danger, he is precluded from recovering for resulting injuries." *Hooton v. City of Burley* (Idaho), 219 P. 2d 651 at 654.

The appellant Pehrson testified that as Mr. Hurst ascended the ladder ahead of him he felt the ladder slip to the side and then knew that the ladder was not firmly set upon the ground or firmly affixed to the wall at the top (Tr. 99-101, Ex. 13). He admitted-

ly took no precaution to solidly set the ladder at either top or bottom before ascending the same, admitted that he knew and realized that there was a hazard and risk of injury in ascending the ladder under such conditions, stating that he intentionally "took a chance" that accident and injury would not result (Tr. 101-116, Ex. 13).

Under such circumstances it must be held as a matter of law that appellant was guilty of contributory negligence in failing to exercise reasonable care for his own safety and assumed all risk of injury involved in his use of the ladder under the conditions related. See *Caron v. Gray's Harbor County*, 139 P. 2d 626; *Moody v. Hanlon*, 179 Sou. 164; *Duncan v. Gernert Bros.*, 87 SW 762.

CONCLUSION

We submit that no error was committed upon the trial and that under the evidence, no judgment other than that of dismissal of appellant's action could be sustained in law.

Respectfully submitted,

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IN THE
United States
Court of Appeals
For the Ninth Circuit

G. A. PEHRSON,

Appellant,

VS.

C. B. LAUCH CONSTRUCTION CO., a Corporation,
Appellee.

*Appeal from the United States District Court
for the District of Idaho,
Northern Division.*

REPLY BRIEF OF APPELLANT

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Stripped of the niceties and replying to appellee's evasive arguments:

The appellant must get to the roof of the school building immediately because the appellee was not laying the roof according to the terms and specifications of the contract. (Tr. 50) Appellee forced those connected with the construction of the building to get to the 19 foot roof with a 16 foot ladder. (Tr. 109) The ladder was too short and had to stand too straight. (Tr. 109) In getting from the upper end of the ladder to the roof it was necessary to crawl (Tr. 166), jump (Tr. 182), climb (Tr. 196) to the roof.

To get to the ladder was difficult. Appellant had to climb over broken concrete blocks, broken boards and other rubbish. (Tr. 95) These waste materials made it impossible to see how the base of the ladder rested upon the ground. Appellant could not even see or adjust the ladder. All this junk, especially the broken concrete blocks, must have been on and around the premises a long time because the building was far past the state where concrete blocks had been used. (Tr. 87-102-109)

Rubbish lying around building construction jobs creates such dangerous hazards that the Idaho safety laws are very strict and definite. Section 1.117 of the General Requirements referred to in our opening brief states:

“All scrap lumber, waste material, and rubbish from the building construction shall be collected and removed, stored in neat piles, and not left to accumulate.”

We tried in vain to get this all-important Code in evidence. The Court repeatedly said he would take care of it in preparing his instructions to the jury. (Tr. 56, 57) The Court not only refused to give the jury the aid of this part of the code, he, on his own motion, during the examination of appellee's first witness, struck from the complaint the allegation concerning rubbish laying about the place.

Indeed we do contend that falling on broken concrete blocks added to the injuries. Appellant had previously fallen but never on broken concrete blocks. Falling on broken concrete blocks caused his limbs to be wired and bolted together, forcing him to spend the remainder of his life in misery, pain and suffering. (Tr. 81) All this by the gross negligence of appellee by not furnishing the men connected with the work on the building adequate means and proper place to work. (Tr. 81-123-124-125)

In addition, the Idaho Safety Code says:

“In the use of ladders from the ground, the lower end shall be placed on a solid footing to prevent it sinking into the earth. Also if the top of the ladder is in danger of slipping or tipping, it shall be securely tied or fastened.”

The Court refused to give the jury our requested Instruction No. 5 on this point.

Appellee says appellant took a chance. Architects always take chances. (Tr. 95) Architects must take chances, else contractors would not do their work properly, as appellee was neglecting his contractual duties on the date of the fall.

Appellant took no more chances that day than usual. He took chances when he built the Davenport Hotel, when he built the great Hanford Project during 1943-1945 (Tr. 28), some 1600 projects within the 50 years of his outstanding work as an architect. No, appellant is no amateur, he knows how to get around a building under normal and natural conditions.

Did the ladder slip to the left?

Appellee's witnesses say the ladder was standing against the wall in its natural position after the accident. (Tr. 168-169-190)

The accident came about by appellant trying to get his body from the top of the short 16 foot ladder to a 19 foot roof. The top of the ladder was not tied, its base was surrounded with rubbish.

The architect, under his contract, must make inspection. He is as necessary in the construction of a building as the carpenters or bricklayers. Our cases cited in our opening brief amply support this contention as to why requested Instruction No. 5 should have been given.

Appellant's witness Hirst should have testified for the reasons stated in our opening brief — cases cited there.

We submit the Court erred as set forth in our opening brief.

Respectfully submitted,

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United States
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For the Ninth Circuit

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a corporation,

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ALLY AND AS FINANCIAL SECRETARY
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AND JOSEPH S. BOGARD,

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JURISDICTION

The jurisdiction of this Court and of the District Court in this case is granted,

(a) By Section 1332 of 28 U.S.C.A., by reason of the diversity of citizenship of the parties, and the amount involved (R. 4-5).

The allegation in the complaint that the amount involved exceeds \$3,000.00 is admitted by defendant's motion to dismiss.

KVOS v. Associated Press, 299 U. S. 268,
81 L. Ed. 183-187.

(b) By Section 1331 of 28 U.S.C.A., giving Federal courts jurisdiction in cases arising under Fed-

eral statutes where amount involved exceeds \$3,000.00, taken in connection with the Interstate Commerce Act, Section 1 of 49 U.S.C.A. and the penalties therein imposed.

(c) By Sections 1336 and 1337 of 28 U.S.C.A. providing jurisdiction, without reference to amount involved, in cases arising under any Act of Congress regulating commerce.

(d) For statement of the fact situation, refer to Statement of Facts, this brief.

In *Re Lennon*, 166 U.S. 548, 41 L. Ed. 1110.
Brotherhood of R. R. Trainmen v. Swan
(7 C.A.A) 214 F. (2) 56.

S. E. Overton v. International Brotherhood of Teamsters (Mich.) 115 F. Sup. 764, 768.

Pacific Gamble Robinson Co. v. M. & St. L. R. Co. (Minn.) 83 F. Sup. 860.

STATEMENT OF THE CASE

By its complaint in the United States District Court for the District of Montana, (R. 10) the plaintiff and appellant, Great Northern Railway Company, seeks injunctive relief to remove from its railroad right-of-way leading to the Foley's Mill plant in Helena, Montana, the picket line being maintained by the defendants and appellees, the Lumber and Sawmill Workers Local Union No. 2409, its officers, agents and associates on strike against the Foley's Mill, in order that the Railway Company may serve the Foley's Mill in interstate commerce, as it, as a common carrier by railroad engaged in interstate commerce, is required to do

by the provisions of the Interstate Commerce Act of Congress, 49 U.S.C.A., Section 1 (4) (17).

QUESTIONS INVOLVED

The controlling question involved here is: Is the appellant Railway Company, in the performance of its duty under the Interstate Commerce Act. (49 U.S.C.A. 1, etc.) to serve all the public, denied the right to go into the courts for injunctive relief against Union pickets upon its right of way, by either the Norris-LaGuardia Act (29 U.S.C.A. 104-113), or by the Taft-Hartley Act (29 U.S.C.A. Supp. 151-158)?

MANNER IN WHICH QUESTION IS RAISED

The Order and Judgment of the District Court sustains defendants' Motion to Dismiss the first cause of action set up in the Complaint upon grounds that the Complaint fails to state a claim against defendants upon which injunctive relief can be granted, and this appeal is from that Order and Judgment. (R. 34)

SPECIFICATIONS OF ERRORS

((1) The United States District Court erred in holding that the complaint discloses that this case involves or grows out of a labor dispute, under the provisions of subsection (a) of Section 113 of 29 U.S.C.A. (Norris-LaGuardia Act) so as to preclude injunctive relief under the Sections 52 and 104 of 29 U.S.C.A.

(2) The United States District Court erred in

holding that the complaint discloses that plaintiff, Great Northern Railway Company or its employees, are either a person or association participating or interested in the labor dispute existing between defendants and the Foley's Mill, under the provisions of subsection (b) of Section 113 of 29 U.S.C.A., so as to preclude injunctive relief under the Sections 52 and 104 U.S.C.A.

(3) That the United States District Court erred in its failure to consider the Interstate Commerce Commission's Order No. 904, Exhibit "A" to the Complaint, imposing the further obligations upon the plaintiff as a common carrier to deliver and receive freight cars to and from the Foley struck plant within the 24 hour time limit provided by said Order, with its attendant severe penalties imposed on the carrier for failure to comply with the Order.

(4) The United States District Court erred in holding that the plaintiff Railway Company was not entitled to injunctive relief from the Union pickets occupying the railroad right-of-way and interfering with and delaying the spotting and removing of cars at and from the struck plant by non-union supervisory officials of the Railway Company as set forth in the complaint.

(5) That the United States District Court erred in holding that the appellant Railway Company had access to the National Labor Relations Board under Sections 151-159 of 29 U.S.C.A. Supplement (Act of 1947) for relief against the picketing being maintained against it by defendants, and that such right

of relief before N.L.R.B. excludes jurisdiction in the courts to grant injunctive relief against defendants maintaining the pickets.

(6) That the United States District Court erred in granting defendants' motion to dismiss the first cause of action set forth in the complaint and in dismissing the complaint as to said first cause of action.

FACT SITUATION

The complaint discloses that for approximately two years last past and now, a labor dispute has and does exist between the defendants and Foley's Mill situated on a spur track of plaintiff Railway Company in the City of Helena, Montana, which spur track crosses Roberts Street; that in the prosecution of that dispute, the defendants, with a picket line, block with their bodies, the spur track as it crosses Roberts Street, preventing the delivery and receipt by the Railway Company of freight cars with interstate shipments of merchandise to and from the Foley Milli; the plaintiff's regular switch crew refuses to move its train through the picket line; that at the expense of much money costs and delay in time, the plaintiff Railway Company requires a crew of its supervisory officials to periodically travel the 95 miles from Great Falls, Montana, to Helena for the purpose of handling the switch engine in serving the Foley's Mill; that upon arrival of the crew from Great Falls, the plaintiff Railway Company calls for the Helena police, who have in the past responded and removed the pickets

from the railroad crossing, permitting the substitute switch crew to remove and spot the accumulation of cars from and to the Foley's Mill; that since January 1, 1954, there have been 152 such cars to be handled at a cost of 165 man days, and a money cost of \$5,500.00; that by its Order, Exhibit "A" to the complaint (R. 12) the Interstate Commerce Commission, because of car shortage, requires plaintiff Railway Company to handle cars for shippers from and to its local yards on a 24-hour schedule, and without regard to whether or not the particular car does, or is immediately to carry freight in interstate commerce; that plaintiff Railway Company has not supervisory officials in sufficient numbers available to comply with the 24-hour schedule, and is thereby subject to the penalties up to \$500.00 for each offense, plus \$50.00 per day of delay, under the Interstate Commerce Act of Congress (49 U.S.C.A. Section 1 (17)); and that the defendants threaten to and will, unless enjoined by the Court, continue in the future such interference with the operation of the railroad, subjecting plaintiff Railway Company to the penalty of indefinite amounts in damage and for failing to serve the Foley's Mill, and to indefinite amounts of penalties for failure to comply with the Order, Exhibit "A" (R. 7 and 10).

ARGUMENT

The appellant Railway Company here seeks injunctive relief in the courts to remove the defendant pickets from its right-of-way so as to enable it to comply with the Interstate Commerce Acts of Con-

gress (49 U.S.C.A. 1 (17)) requiring the Railway Company to furnish interstate rail service to all the public, including shippers involved in a labor dispute.

It is unreasonable to assume that by the labor laws the Congress meant to place in the Unions the power, through pickets, to tie up all rail service, so vital to the daily welfare of this community, leaving the community without injunctive relief through the courts, and entirely helpless for the period of time required for it to get relief through proceedings before the National Labor Relations Board—a single tribunal with exclusive jurisdiction to handle all such matters for the whole country, much of which is thousands of miles distant from the seat of that Board in Washington, D.C.

The foregoing is no fanciful suggestion, in that if the labor laws are so interpreted as to empower the Union pickets to tie up one industry track of the appellant Railway Company in this community without relief except through proceeding before the National Labor Relations Board, then by the exercise of the same power, the Union may picket the main lines of the two railroads serving this community to increase the economic pressure on the one struck plant, leaving this whole community helpless and without rail service, and without recourse to the courts, until relief may be had through the National Labor Relations Board.

EFFECT OF NORRIS-LaGUARDIA ACT

The Norris-LaGuardia Act (29 U.S.C.A. 104-

113) does not deny injunctive relief in the courts except that the court Order interferes with a "labor dispute" and is sought by a person "interested directly or indirectly" in that labor dispute.

LABOR DISPUTE DELIMITED

A "labor dispute" is defined in each, the Act of March 23, 1932 (29 U.S.C.A. 113 (c)), the Act of June 14, 1935 (29 U.S.C.A. 152 (9)), and in the Act of June 23, 1947 (29 U.S.C.A. Sup. 152 (9)) in this language:

"(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

"(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation; or have direct or indirect interests therein; or who are employees of the same employer;" etc. (29 U.S.C.A. 13).

INTEREST IN LABOR DISPUTE DELIMITED

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein," etc. (29 U.S.C.A. 113 (b)).

NORRIS-LaGUARDIA ACT HAS NO APPLICATION IN THE INSTANT CASE

No relief is sought by the Union against the appellant Railway Company in the labor dispute between the Union and the Foley's Mill, and therefore, the appellant Railway Company is not "A person or association . . . participating or interested in" the labor dispute existing between the Union and the Foley's Mill. Therefore, the Norris LaGuardia Act (29 U.S.C.A. 104-107) does not withhold from the appellant Railway Company the right to injunctive relief in the courts against the pickets occupying its right-of-way.

TAFT-HARTLEY ACT DELIMITED

The allegations of the complaint do not bring our case here within the orbit of the Labor-Management Relations Acts of the Congress, so as to give the National Labor Relations Board exclusive jurisdiction to grant relief.

That Board is given exclusive jurisdiction for the arbitrament of a limited group of acts therein defined and described as "unfair labor practices." and therefore, the National Labor Relations Board has no jurisdiction over the controversy described in the complaint.

Subsection (b) (4) of the Section 158, among the statutory definitions, provides:

"It shall be an unfair labor practice for a labor union or its agents

* * * *

"(4) to engage in, or to induce or encourage

the employees of any employer to engage in, a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to perform any service where the object thereof is: (a) forcing or requiring . . . any employer or other person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;” etc.

QUESTION FOR DECISION HERE

Our case on this appeal resolves itself into the two questions:

(1) If it is assumed, for the sake of the argument, that insofar as the Union's acts of maintaining pickets on the right-of-way of the appellant Railway Company is for the *object* of inducing appellant's regular switch crew to refuse to transport goods to the Foley's Mill, is a matter for the exclusive jurisdiction of the National Labor Relations Board, has that Board any jurisdiction over the question of appellant Railway Company's right to injunction to remove the pickets from its right-of-way and interfering with appellant's efforts to furnish service to the struck plant by means of its officials, in order to comply with the Interstate Commerce Acts requiring the Railway Company to furnish service to the struck plant? And,

(2) Has the National Labor Relations Board jurisdiction to decide as between the Interstate Commerce Act requiring the rail service to the struck

plant and the effect of the labor laws interfering with that duty to furnish rail service in a situation as here, where no relief is sought from the Railway Company by the Union in its dispute with the struck plant, Foley's Mill?

We recognize that the Supreme Court has recently (January 9, 1956) held in the New Haven Railroad "piggy-back" case that when the labor dispute is between the Union (non-railway union) and the Railroad to obtain relief directly from the railroad with the object of creating jobs for the union members, the N.L.R.B. has jurisdiction to the exclusion of the courts. But the fact that in the New Haven case relief was sought by the Union directly against, and which the Railroad had within its power to grant, increasing jobs for the Union members, distinguishes the New Haven case from our case before this Court.

LABOR UNION RIGHTS VERSUS RAIL SERVICE

It seems to us that the Congress, by the labor laws, did not intend to put the rail service to the whole country at the mercy of the labor unions and proceedings before the National Labor Relations Board, but that where, as here, the Union seeks no relief from the Railway Company in its labor dispute with the prospective shipper, the question of the Railway Company's obligation to furnish rail service under the I.C.C. Acts of Congress being protected by the courts, as opposed to the Union's right to have its acts submitted to the N.L.R.B. under the

labor laws, is not one to be resolved by the Board under its limited jurisdiction.

The following seven cases from Federal District Courts and three from the highest State courts hold for the Court's jurisdiction to grant injunctive relief on the suit by the Railway:

Erie R. Co. v. Local 1286 of Longshoremen, etc. (N.Y.) 117 F. Sup. 157.

Pacific Gamble Robinson Co. v. M. & St. L. Ry. (Minn.) 85 F. Sup. 65.

Illinois C. R. Co. v. International Brotherhood of Teamsters (La.) 90 F. Sup. 640.

Louisville & N. R. Co. v. Local Union, etc. Woodworkers, etc. (Ala.) 104 F. Sup. 748.

Montgomery Ward, etc. v. Northern Pac. Terminal Co. (Ore.) 128 F. Sup. 475.

Southern Pacific v. Cannery Warehousemen (Ore.) 127 F. Sup. 703.

Hunt v. Crumbock (Pa.) 44 F. Sup. 796.

Northwestern Pac. R. Co. v. Lumber & Sawmill Workers Union (Calif.) 189 P. (2) 227.

Burlington Transpn. Co. v. Hathaway (Iowa) 12 NW (2d) 167.

General Drivers, etc. Union v. American Tobacco Co. (Ky.) 264 S.W. (2) 250.

In the following cases, in which the employer-employee relationship did not exist, but where the Union sought relief directly from the employer with the object of creating jobs for its Union members, the Supreme Court, construing the labor laws, has held against Court jurisdiction to grant injunctive relief:

New Negro Alliance v. Sanitary Grocery, 303 U.S. 552, 82 L.Ed. 1012, to force the grocery company to accept negroes as employees.

Milk Drivers, etc. v. Lake Valley, etc. 311 U.S. 91, 85 L.Ed. 63, to force Chicago stores to

discontinue dealing with Lake Valley and take milk from wholesalers employing Union drivers.

Joseph Garner, et al v. Teamsters, etc. Union, 346 U.S. 485, 98 L.Ed. 228, to force Garner to compel his employees to join the defendant Union.

Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 99 L.Ed. 546, to force the Brewery to allot certain work to Weber's Union, as against another Union.

Local Union etc. Teamsters v. New York, New Haven & Hartford R. Co., decided January 9, 1956, to force the Railroad to discontinue the service of "piggy-back" truck trailers, with a view to increasing jobs for the Union members.

WHAT IS NOT A LABOR DISPUTE

In the following cases the Supreme Court has held no "labor dispute" was involved, and that therefore jurisdiction in the courts to grant injunctive relief on application by the aggrieved party was not denied by the labor laws.

Dorchy v. Kansas, 272 U.S. 306, 71 L.Ed. 248.
Columbia River Packers etc. v. Hinton, 315 U.S. 143, 86 L.Ed. 750.

Bakery etc. Union v. Wagshal, 333 U.S. 437, 92 L.Ed. 792.

LIMITS OF SECTION 107 OF 29 U.S.C.A.

As to the conditions and restrictions provided in Section 107 (Act of 1932) upon the granting of injunctive relief by the courts, it is clear that by that section the courts may grant injunctive relief *to protect physical property* from threatened injury by the labor union agents, in any case involving a

“labor dispute”, and as between “persons interested in a labor dispute,” and in a labor dispute between employer and employees, without restrictions whatever, except that the court must find,

“(b) That substantial and irreparable injury to complainant’s property will follow:”

“(c) That as to each item of relief granted, greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;”

* * * *

“(e) That the public officers charged with the duty to protect complainant’s property are unable or unwilling to furnish adequate protection.”

Thus we see that Section 107 is designed only to protect *physical property*, and does not apply to our case, in which the Court would have no means of measuring appellant’s possible damage from shippers’ claims and I.C.C penalties. Moreover, there could be no protection of appellant by the police against damages from such sources as appellant is subjected by the Union. Section 107 has no bearing on the question of whether or not the Railway Company is entitled to injunctive relief when there is no question of threatened damage to appellant’s physical property.

CONCLUSION

The complaint here states a cause of action for injunctive relief against the pickets occupying appellant Railway Company’s right-of-way upon each of the following grounds:

(1) The Federal government is without right or power to make or enforce these statutes setting labor unions apart from the general public as a favored class freed of injunctive proceedings in the courts except that such right and power can be spelled out of the Commerce Clause of the Federal Constitution. And to spell that right and power out of the Commerce Clause, the framers of these ^{labor} local laws based them on the two propositions: (a) that every man has the right to cease his employment—to strike—and (b) the strike stops the flow of goods in commerce.

That, of course, is a strained construction of the Commerce Clause of the Federal constitution, and in recognition of that fact, the framers of these labor laws went to great detail to declare "the public policy of the United States with the idea of bringing these labor laws within the Commerce Clause.

To quote parts of that declaration of the public policy:

"It is declared to be the public policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions . . ."

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest," etc. (Act July 5, 1935, 49 Stat. 449; 29 U.S.C.A. 151).

While we all can agree that the declaration by

the Congress of "public policy" does not enlarge or change the Commerce Clause of the Federal Constitution, it is a guide to the interpretation and limits of the labor ^{laws} group upon the question of jurisdiction of the courts to grant injunctive relief.

Those limits fall short of protecting the Union's acts against a person from whom no direct relief is sought in the labor dispute and which actually are designed primarily to impede the flow of commerce. The labor laws must be so limited, otherwise they cease to have the protection of the Commerce Clause.

(2) In the labor dispute between the Foley's Mill and the Union, no relief is sought against the appellant Railway Company and therefore the appellant Railway Company is not "directly or *indirectly*" interested in that labor dispute within the meaning and limits of the labor laws, and therefore the Court's jurisdiction to grant injunctive relief against the defendant pickets is not denied by the labor laws.

(3) The labor laws do not nullify the railroad carrier Acts of Congress which require the appellant Railway Company to serve the struck plant.

(4) The labor laws so limit the jurisdiction of the National Labor Relations Board (29 U.S.C.A. Sup. 158) that the question of whether or not the appellant Railway Company, in furnishing rail service to the struck plant, is "doing business with" the struck plant, Foley's Mill, within the meaning of subsection (b) (4) of Section 158 of 29 U.S.C.A. Sup., so as to give N.L.R.B. jurisdiction, or only

complying with requirements of the I.C.C. Acts (49 U. S. C. A. 1) that it furnish the rail service, is beyond the jurisdiction of N.L.R.B. . . .

It seems to us that the line limiting the jurisdiction of N.L.R.B. in these cases involving the picketing of railroads should be drawn at the point where the Union seeks relief directly against the railroad, as in the New Haven case, and that the whole country should not be left in the lap of N.L.R.B. and to the whim of the Union in the matter of picketing the railroad, solely to bring economic pressure upon a prospective shipper, and where no relief is sought by the Union against the railroad.

Respectively submitted,

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Brief of Appellees

United States Court of Appeals

for the Ninth Circuit

No. 14934

GREAT NORTHERN RAILWAY COMPANY,
a corporation,

Appellant,

vs.

LUMBER AND SAWMILL WORKERS, LOCAL UNION
NO. 2409, A VOLUNTARY ASSOCIATION AND
LABOR UNION, HELEN M. BOUCHEY, INDIVIDU-
ALLY AND AS PRESIDENT OF SAID LABOR
UNION, DORIS M. TRAYNOR, INDIVIDUALLY
AND AS SECRETARY OF SAID LABOR UNION,
RAY F. LINDBERG, INDIVIDUALLY AND AS FI-
NANCIAL SECRETARY OF SAID UNION, LEONA
L. STEIN AND JOSEPH S. BOAGARD,

Appellees.

LEIF ERICKSON,
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FILED

MAY - 7 1956

PAUL P. O'BRIEN, CLERK

QUESTIONS INVOLVED

(1) Does the complaint state facts warranting the issuance of a writ of injunction under the general laws applicable to injunctions?

(2) Does the National Labor Relations Board have exclusive jurisdiction of the cause? (29 U.S.C.A., Sections 151-153).

(3) Is there a labor dispute within the Norris-La-Guardia Act? (29 U.S.C.A., Sections 104-113).

The questions are raised by the Order of the District Court dismissing the action.

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JURISDICTION

This Court and the District Court have no jurisdiction. Jurisdiction of the case is in the National Labor Relations Board.

STATEMENT OF THE CASE

The complaint seeks to enjoin appellees from interfering with, delaying and preventing appellant from delivering to and receiving rail shipments from Foley's Mill and Cabinet Works in Helena, Montana. It is alleged that picketing conducted by appellees results in the refusal of the regular train crews employed by appellant, by reason of their union obligations, to spot cars billed to and to receive cars billed by the Cabinet Works. The complaint sets forth that for this reason appellant must use supervisory personnel to handle the cars to and from the Cabinet Works resulting in delay in the movements and added cost to appellant. It is also alleged that before cars are moved in and out of the Cabinet Works, police are summoned to remove the pickets.

A second cause of action for damages was dismissed by stipulation.

The District Court granted a motion by appellees to dismiss the cause of action seeking the injunction because it failed to state a claim for which relief could be granted.

SUMMARY OF ARGUMENT

(1) The facts stated in the complaint do not warrant relief to appellant even under the general laws applying to injunctions.

(2) Exclusive jurisdiction of the dispute rests in the National Labor Relations Board.

(3) The facts show a labor dispute within the Norris-LaGuardia Act.

ARGUMENT

COMPLAINT INSUFFICIENT UNDER GENERAL LAW

The Order granting the motion to dismiss the complaint contains this language:

"However, it appears to the court to be unnecessary to decide whether or not the controversy between the defendants and the plaintiff in this case constitutes a labor dispute under the provisions of the Norris-LaGuardia Act because even if the Norris-LaGuardia Act and the Clayton Act do not apply in this case, the complaint is still insufficient under the general law relating to injunctions to warrant the issuance of an injunction as prayed for.

"From the allegations of the complaint, all of which for the purposes of this motion the court must accept as true, the court is unable to find that plaintiff has suffered, or will suffer, any irreparable injuries as the result of the picketing of Foley's Mill and Cabinet Works by the defendants. The complaint shows that plaintiff has at all times been able to pick up from and make deliveries to the struck plant, albeit at extra cost. However, this extra cost apparently is simple of ascertainment, as it has been alleged in the complaint, and if the extra cost has been imposed upon plaintiff by the wrongful conduct of the defendants, or any other parties, plaintiff may recover its damages in an

action at law. In these circumstances, an injunction will not lie." (Tr. 23).

These conclusions of the Court in its order are fully supported by the allegations of the complaint. Paragraphs IX, X, XI, XII. (Tr. 7, 8, 9).

Because it so succinctly states the position taken by the appellees, we also take the liberty of quoting the following from the order of the Court:

"The only damage which plaintiff alleged in its complaint consists of the increased costs incurred by it in bringing supervisory personnel from Great Falls to Helena to man its switch engine. It appears from the face of the complaint that this extra expense is incurred not because of any illegal picketing of defendants, but for the reason that the employees of plaintiff, in the words of the complaint, '*because of their union obligations, have invariably refused to spot cars billed to and to receive cars billed by said Foley's Mill and Cabinet Works*'. In other words, from the complaint it appears that plaintiff's regular train crew refused to spot cars billed to and received from the struck plant, *not because of the physical presence of pickets on the right of way, but only because of the existence of a picket line.* (Emphasis supplied). (Tr. 25, 26)."

The language referred to by the Court above is found in Paragraph IX of the complaint. (Tr. 7).

The District Court cites and quotes from *Great Northern Railway Company v. Local Great Falls Lodge of International Association of Machinists, No. 287, et al*, 283 Fed.

557, as authority for its conclusion that no case for injunctive relief has been stated. The Court's attention is called to the quotation from that decision at Transcript 24.

The Montana Rule on injunctions is found in *Section 93-4204, R.C.M., 1947*, reading:

"Except where otherwise provided by the provisions of the code governing specific and preventive relief, (Sections 17-701 to 17-1101), a final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant:

(1) Where pecuniary compensation would not afford adequate relief;

(2) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;

(3) Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or,

(4) Where the obligation arises from a trust."

The most this complaint shows is that the railroad is put to a considerable amount of inconvenience in bringing supervisory personnel from Great Falls to Helena to operate the railroad equipment. At the same time, as is pointed out by the District Court, the complaint on its face shows that the extent of the damage is ascertainable and that the injury may be compensated for by an award of damages.

As pointed out in the quotation from *Great Northern Railway Company v. Local Great Falls Lodge of International Association of Machinists, supra*:

"That the applicant is annoyed, threatened and injured will never justify a court to grant him an injunction unless these trespasses are so great that they threaten him with irreparable injuries * * *."

The order of the District Court further points out that injunction will not be granted unless there appears, "... reasonable certainty that the injunction will be effective to prevent the damage which it seeks to prevent." See *Elliot v. Amalgamated Meat Cutter sand Butcher's Workmen of America, A. F. of L., D. C. Missouri*, 91 *Fed. Supp.* 690. By the complaint, the train crews refuse to cross the picket line, "... because of their union obligations." As pointed out by the District Court, if it did issue an injunction, the order could not forbid legal picketing and so long as there was picketing the complaint makes it clear the train crews would respect the line.

Whether the facts alleged in the complaint bring this case within the Norris-LaGuardia Act, 29 *U.S.C.A.*, Chapter 6, or the Clayton Act, 29 *U.S.C.A.*, Section 52, need not be determined if the District Court was correct in concluding that no case for an injunction was stated even under the general rules.

THE COURT IS WITHOUT JURISDICTION

The brief of plaintiff is devoted almost entirely to an attempt to distinguish the facts in this case from the facts in the case of *Local Union No. 25 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and*

Helpers of America, et al, v. The New York, New Haven and Hartford Railroad Company, 76 S. Ct. 227. The distinction is attempted to be stated at pages 11 and 16 of appellant's brief. The effect of the statement is that in appellant's view, those picketing were seeking relief in that case against the Railway Company, while in the present case, there is no attempt by the picketers to seek any relief against the Railway Company, either "directly or indirectly."

The facts as they appear in the opinion in *Local Union No. 25, etc., v. The New York, New Haven, etc., Railway*, are that the railroad furnished what is referred to as a "piggy-backing" service under which truck trailers were brought to the railroad's yards by members of the union, and the trailers were then loaded on flat cars for the shipment. It was the view of the union that this reduced the amount of employment available to its members. The union attempted to get an agreement from employers of its members, the motor carriers, to cease participation in this plan. Those attempts were unsuccessful so the union started picketing the railroad yards, and persuaded their members not to load the trailers on the railroad flat cars.

The complaint alleged that the union was seeking to enforce "a boycott against" the railroad. The complaint further alleged that the picketing was an attempt to require shippers and motor carriers "to assign work to members of respondent union, and to thereby commit an unfair labor

practice * * *.” Finally, the complaint alleged that the acts resulted in an unlawful secondary boycott.

In the language of the Court, the question for resolution by the Court in that case depended upon:

“(1) Whether respondent, as a railroad subject to the Railway Labor Act may avail itself of the processes of the N.L.R.B., and

“(2) If respondent may do so, was it required, in the circumstances of this case, to seek relief from that tribunal rather than from the state courts.”

After pointing out that as between railroads and their employees, the Labor Management Relations Act has no application, the Court said:

“The N.L.R.B. is empowered to issue complaints whenever ‘it is charged’ that any person subject to the Act is engaged in any proscribed unfair labor practice. (Sec. 10 (b)).”

While no specific reference is made in the complaint in the present case to the National Labor Relations Act, if the allegations of the complaint are true, the conduct of the respondents would be proscribed by the Act. 29 U.S. C.A., Sec. 158 (b).

The gist of the decision in the Local Union No. 25 case, is stated as follows:

“As we noted earlier, respondent’s amended complaint alleged violations of the Act. Whether the Act was violated, or whether as respondent now claims it was not, is, of course, a question for the Board to de-

termine. *Even if petitioners' conduct is not prohibited by Section 8 of the Act, it may come within the protection of Section 7, in which case the state was not free to enjoin the conduct.*" (Emphasis supplied).

As may be seen, the decision in no manner rests upon any conclusion that the relief sought by the union was either directly or indirectly against the railroad. The decision is based upon a determination by the Court that whenever the question arises as to whether the conduct of those picketing would be prohibited under Section 8 (b), 29 U.S.C.A. 158 (b), or within the protection of Section 7 29 U.S.C.A., Sec. 157, of the Act, the National Labor Relations Board has exclusive jurisdiction.

In support of its position, the Court cited and quotes from *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 481, 75 S. Ct. 480, 488.

In the Weber case, the union involved picketed the employer because the employer entered into contracts with outside companies to do certain mill work, and the outside contractors employed members of a union other than the picketing union.

In holding that the N.L.R.B. had exclusive jurisdiction, the Court, as in the case of *Local Union No. 25, etc., vs. New York, etc. Railroad*, based its decision solely on whether the suit raises the question of whether the conduct sought to be enjoined might be either protected or proscribed by the National Labor Relations Act.

Among other things, the Court said:

"... even if it were clear that no unfair labor practices were involved, it would not necessarily follow that the state was free to issue its injunction. If this conduct does not fall within the prohibition of Section 8 of the Taft-Hartley Act, it may fall within the protection of Section 7 as concerted activity for the purpose of mutual aid or protection."

Further the Court says:

"A state may not enjoin under its own labor statute, conduct which has been made an 'unfair labor practice' under the federal statutes."

Finally the Court says:

"Respondent itself alleged that the union conduct it was seeking to stop came within the prohibitions of the Federal Act, and yet it disregarded the Board, and obtained relief from the state court. It is perfectly clear that had respondent gone first to a federal court instead of the state court, the federal court would have declined jurisdiction, at least as to the unfair labor practices on the ground that exclusive primary jurisdiction was in the Board."

While, as we have pointed out no specific reference is made to the Taft-Hartley Act, in this complaint, the allegations raise but a single question and that is whether the conduct of appellees is either protected or proscribed, and that question cannot be determined without reference to the Taft Hartley Act.

Another case in point is *Garner v. Teamsters' Union*, 346 U.S. 485, 499, 74 S. Ct. 161.

The facts in this case cannot be distinguished from the facts in the Weber case, and in the case of Local Union No. 25 v. New York, New Haven and Hartford Railway Company. The decisions are controlling, and exclusive jurisdiction over this dispute rests in the National Labor Relations Board.

THE NORRIS-LAGUARDIA ACT AND THE CLAYTON ACT APPLY

In view of the holding in *Local Union No. 25 of International Brotherhood of Teamsters', Chauffeurs, Warehousemen's and Helpers of America v. New York, New Haven and Hartford Railway Company, supra*, and the decisions in *Weber v. Anheuser-Busch Company, supra*, we will not burden this brief with extended arguments to the effect that the facts alleged bring this case within the Norris-LaGuardia Act, but the facts bring this case within that act and the Clayton Act, prohibiting injunctions in labor disputes, except under the defined circumstances set out. 29 U.S.C.A., Sec. 101, 102, 104, 107.

One of the requirements of the Norris-LaGuardia Act, Section 107 (e) is that the complaint must allege and the Court must find: ". . . that the public officers charged with the duty to protect complainant's property, are unable to or unwilling to furnish adequate protection." Here the complaint reveals that appellant has had full cooperation

from the police department of the City of Helena, and there could be no finding that public officers had failed to protect appellant's property.

That the Norris-LaGuardia Act applies is clearly established by the following cases: *New Negro Alliance v. Sanitary Grocery*, 303 U.S. 552, 78 S. Ct. 161; *United States v. Hutchison*, 312 U.S. 219, 61 S. Ct. 463; *Milkwagon Driver's Union v. Lake Valley Farm Products, Inc.*, 311, U.S. 91, 61 S. Ct. 122; *Apex Hosiery Company v. Leader*, 310 U.S. 469, 507, 60 S. Ct. 982, 999; *Bedford Cut Stone Company v. Journeyman's Stone Cutters Association*, 274 U.S. 37, 47 S. Ct. 522, 54 A.L.R. 791; *Green v. Oberfeldt, et al*, C.A., D.C., 121 Fed. (2d) 4650; *Leeway Motor Freight, Inc., et al v Keystone Freightlines', Inc., et al*, CA 10, 126 Fed. (2d) 931; *Lauf v. E. G. Shinner, S.W.*, 303 U.S. 323, 58 S. Ct. 578.

CONCLUSION

Respondent respectfully submit:

- (1) That the complaint fails to state a claim for an injunction under the general law as to injunctions;
- (2) That the National Labor Relations Board has exclusive jurisdiction;
- (3) That the Norris-LaGuardia Act applies and the complaint fails to state a claim for relief under that Act.

The order of the District Court should be affirmed and the appeal dismissed.

LEIF ERICKSON,

Attorney for Appellees.

No. 14934

United States
Court of Appeals
For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY,
a corporation,

APPELLANT,

v.

LUMBER AND SAWMILL WORKERS, LOCAL
UNION NO. 2409, A VOLUNTARY ASSO-
CIATION AND LABOR UNION, HELEN M.
BOUCHEY, INDIVIDUALLY AND AS
PRESIDENT OF SAID LABOR UNION,
DORIS M. TRAYNOR, INDIVIDUALLY
AND AS SECRETARY OF SAID LABOR
UNION, RAY F. LINDBERG, INDIVIDU-
ALLY AND AS FINANCIAL SECRETARY
OF SAID LABOR UNION, LEONA L. STEIN
AND JOSEPH S. BOGARD,

APPELLEES.

Reply Brief for Appellant

TAYLOR B. WEIR,
NEWELL GOUGH, JR.
ENOR K. MATSON,

Attorneys for Appellant,
(Address: Helena, Montana.)



FILED

MAR 12 1934

United States
Court of Appeals
for the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY,
a corporation,

APPELLANT,

v.

LUMBER AND SAWMILL WORKERS, LOCAL
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OF SAID LABOR UNION, LEONA L. STEIN
AND JOSEPH S. BOGARD,

APPELLEES.

Reply Brief for Appellant

Appellee's answer brief ignores the basic ques-
tions presented on this appeal, viz:

(1) Are the I. C. C. Acts of the Congress and the
National labor laws in irreconcilable conflict, the one
requiring the rail carrier to serve the struck plant
and move cars to and from the plant on a 24 hour
time schedule, with severe penalties for failure;
and the other (the National labor laws) empower-
ing the labor union to tie up and prevent rail serv-
ices to the struck plant with picket lines, pending

proceedings before the National Labor Relations Board under the Taft-Hartley Act; and

(2) If, under those conditions, the rail carrier is denied the right of injunctive relief in the courts, is it relieved by the effect of the labor laws from its obligation to serve the struck plant and from the penalties for failure to serve, and the penalties for its failure to maintain the 24 hour time schedule for moving cars, under the Order, Exhibit "A"; or, notwithstanding the picket line interference, the rail carrier is still beholden in damages to the struck plant for its failure to serve, and subject to penalties for failure to serve and maintain the 24 hour time schedule, pending proceedings before N. L. R. B. as in *Montgomery Ward v. Northern Pacific Terminal Co.*, 128 F. Sup. 475? And,

(3) should the I. C. C. Acts and the National labor laws be so construed, as we contend, as to reconcile them to the extent that, unless the labor dispute demands relief directly from the rail carrier of a nature that the rail carrier has it within its power to grant that relief, as in the New Haven "piggy-back" case (76 S. Ct. 227, 100 L. Ed. 164) the Courts retain jurisdiction to grant injunctive relief against picketing of the railroad right-of-way or other interference by the Union with performance by the rail carrier of its statutory duties under the I. C. C. Acts of the Congress.

Unless these Acts of the Congress are so construed and reconciled, we have the situation whereby the rail

service to a whole community could be prevented or interfered with by the Union maintaining picket lines against all railroads serving the community, as a means of bringing economic pressure against one small shipper in the community, pending proceedings before the N. L. R. B.

The right of the rail carrier to proceed against the Union for damages, does not relieve such a situation, and moreover the rail carrier has no right to expend its funds for such extraordinary service, beyond its published tariffs, for the use, as here, of its supervisory officials in an effort to avoid the penalties of the I. C. C. Acts.

Respectively submitted,

TAYLOR B. WEIR

NEWELL GOUGH, JR.

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No. 14,942

United States Court of Appeals
For the Ninth Circuit

WILLIAM R. RUSSELL,	} <i>Appellant,</i>
VS.	
WILLIAM CUNNINGHAM,	

BRIEF FOR APPELLEE.

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FILED

MAR 20 1956

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United States Court of Appeals For the Ninth Circuit

WILLIAM R. RUSSELL,

vs.

WILLIAM CUNNINGHAM,

Appellant,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Appellant in his brief has cited no authority for appeal to this Court. Appellee contends that he is under no duty to supply jurisdictional statements for appellant, and that this appeal should be dismissed for lack of jurisdiction.

STATUTES AND RULES INVOLVED.

Rule 18—Court of Appeals for the Ninth Circuit.

1. Counsel for the appellant shall file with the clerk of this Court 20 copies of a printed brief, and serve upon counsel for the appellant three copies thereof, within 30 days after the clerk has mailed to him copies of the printed record.

2. This brief shall contain, in order here stated—

(a) A subject index of the matter in the brief, with page references, and a table of the cases, alphabetically arranged, with citation to the official reports and National Reporter system, textbooks, statutes, treaties, regulations and rules cited, with references to the page where they are cited.

(b) A statement of the pleadings and facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction to review the judgment, decree or order in question. The statement shall refer distinctly (1) to the statutory provisions believed to sustain the jurisdictions, (2) to any treaty of the United States or statute, the validity of which is involved (giving the volume and page where the treaty or statute may be found in the official edition), setting it out verbatim or appropriately summarizing its pertinent provisions; (3) to the pleading necessary to show the existence of the jurisdictions, referring to the pages of the record in which they appear.

(c) A concise abstract or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(d) In all cases a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged. When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or re-

jected, and refer to the page number in the printed or typewritten transcript where the same may be found. When the error alleged is to the charge of the Court, the specification shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial. In all cases, when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the Court upon such exception.

(e) A concise argument of the case (preferably preceded by a summary), exhibiting a clear statement of the points of law or facts to be discussed, with a reference to the pages of record and the authorities relied upon in support of each point. When a statute, treaty, regulations or rules is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length. If the matter so to be quoted, or matter quoted from opinions, is long it may be set out in an appendix. Except after leave granted, the clerk will not receive a brief of either party which, exclusive of the appendix, is more than eighty pages, or a reply brief of more than twenty.

3. Counsel for an appellee shall file with the clerk 20 copies of a printed brief, and serve upon counsel for the appellant three copies thereof, within 30 days after receipt of copies of the appellant's brief. His

brief shall be of like character with that required of the appellant, except that no specification of error shall be required, and no statement of the case, unless that presented by the appellant is controverted.

4. Counsel for the appellant may serve and file within 10 days after receipt of copies of appellee's brief, 20 printed copies of a reply brief.

5. In cases appealed from the District Courts of Alaska, Hawaii and Guam, and Supreme Court of the Territory of Hawaii, the clerk of this Court shall fix the time within which briefs as mentioned in this rule shall be served and filed.

6. When the cause is prosecuted or defended in forma pauperis, or a party is permitted to proceed on a typewritten brief, the party so circumstanced shall file his brief, which may be in typewritten form, upon a letter size paper, 8 inches by 10½ inches bound on the left margin. An original, and three *clearly legible and unblurred* copies must be filed, and, in accordance with the other provisions of this rule.

7. When the brief for appellant is not filed as required by rule, the clerk shall give notice to counsel for both parties that the matter will be called to the attention of the Court on a day certain, for such action as the Court deems proper, and the case may be dismissed. When, according to this rule, an appellant is otherwise in default, the case may be dismissed on motion; and when an appellee is in default he will not be heard, except on consent of his adversary or by request of the Court.

Rule 41(a)(2) and 41(b) Federal Rules of Civil Procedure for the United States District Courts, Title 28 U.S.C.A.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the Court and upon such terms and conditions as the Court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the Court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of Court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

Rule 54(d) Federal Rules of Civil Procedure for the United States District Courts, Title 28 U.S.C.A.

(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the Court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the Court.

Rule 10, District Court of Guam. Security for Costs.

(a) *By Nonresident.* In every action in which there is a plaintiff who is not a resident of this district, there shall be filed with the complaint, and in every action removed from the Island Court to this Court by a party who is not a resident of this district, there shall be filed with the record on removal, a bond for costs in the sum of \$250.00 unless the Court on motion, which may be made ex parte, and for cause shown, dispenses with the bond or fixes a different amount. The bond shall have sufficient surety and shall be conditioned to secure the payment of all fees that must by law be paid by the non-resident parties to the clerk, marshal, or other officer of the Court, and all costs of the action which they must ultimately be required to pay to any other party. If a bond in the sum of \$250.00 is filed, no approval thereof is necessary. After the bond has

been filed, any opposing party may raise objection to its form or to the sufficiency of the surety for determination by the clerk. If the bond is not filed within the time specified, or if the bond filed is found insufficient, the Court may order that a sufficient bond be filed within a specified time and if the order is not complied with, the clerk shall dismiss the action as of course for want of prosecution.

(b) *By Other Parties.* The Court, on motion of its own initiative, may order any party to file an original bond for costs or additional security for costs in such an amount and so conditioned as the Court by its order may designate.

(d) *Suits as Poor Persons.* At the time application is made for suits by poor persons for leave to commence any civil action without being required to repay fees and costs or give security for them, the applicant shall file a written consent that the recovery, if any, in the action, to such amount as the Court may direct, shall be paid to the clerk who may pay therefrom all unpaid fees and costs taxed against the plaintiff and to his attorney, the amount which the Court allows or approves as compensation for the attorney's services.

STATEMENT OF THE CASE.

Appellant is requesting a declaration from this Court that the District Court of Guam committed a gross abuse of discretion by its orders denying appellant a continuance or dismissal without prejudice and

ordering a dismissal with prejudice for lack of prosecution.

The alleged cause of action was for bodily injury incurred on April 11, 1954. A complaint sounding in assault was filed in the District Court of Guam on April 26, 1954. Defendant Cunningham timely answered on May 15, 1954, denying the allegations of the complaint and alleging self-defense.

On June 4, 1954, a pre-trial order was filed setting forth the issues to be tried, the witnesses expected of each party, and setting the action for trial on August 2, 1954. On motion of plaintiff's counsel, the action was continued and set for second time on May 3, 1955. Pursuant to a subsequent motion by plaintiff another continuance was granted on April 19, 1955, and the action was set for trial on the third date of August 15, 1955. The second paragraph of this April 19, 1955, order states,

“The plaintiff will be expected to be present at that time to testify in person or to testify by deposition, since this order assumes at the present time that further continuance will not be granted.

On or about August 12, 1955, plaintiff moved again for a continuance, or in the alternative, a dismissal without prejudice. This motion was denied. On August 15, 1955, the same motion was orally presented and argued to the Court. It was denied. Plaintiff's counsel then stated that he was unable to proceed to trial in the absence of plaintiff. Proceeding under Rule 41(b), Federal Rules of Civil Procedure, de-

fendant thereupon moved for a dismissal of the action with prejudice. This motion was granted.

On April 1, 1955, and April 11, 1955, plaintiff had commenced two separate actions in the United States District Court for the Northern District of California, Southern Division, naming, *inter alia*, appellee Cunningham as defendant therein. On August 2, 1955, plaintiff had instituted a similar action in the Superior Court in and for the City and County of San Francisco. These actions were substantially the same as the action commenced in Guam. Service was made on appellee while he was taking a vacation in California.

Defendant had incurred the costs and expenses normally incident to a defense against such actions and stood prepared and ready to go to trial in Guam at any time.

ISSUES PRESENTED.

1. Should this appeal be dismissed by reason of the flagrant disregard by counsel for appellant of Rule 18 of this Court, relative to briefs?

2. Did the District Court of Guam grossly abuse its discretion by denying plaintiff's motion for a continuance and for a dismissal without prejudice?

3. Did the District Court of Guam grossly abuse its discretion by granting defendant's motion for dismissal with prejudice?

4. Is the requirement that non-residents commencing an action in Guam post a cost bond, and the granting of costs, improper?

SUMMARY OF ARGUMENT.

It is the contention of appellees that

a. This appeal should be dismissed by reason of the flagrant disregard of counsel for the appellant of Rule 18 pertaining to the requirements of this Court in the filing of briefs.

b. That it was within the sound discretion of the Court to refuse to grant further continuance or to dismiss this action without prejudice on August 15, 1955, and that the Court had before it ample evidence upon which to base its decision.

c. That it was within the sound discretion of the Court to grant defendant's motion for dismissal with prejudice on August 15, 1954, and there is ample substantiation in the record for this decision.

d. That it was not discriminatory to require a cost bond nor to grant costs including fees for taking of deposition to the defendant.

ARGUMENT.

I. APPEAL SHOULD BE DISMISSED.

Rule 18 (6) of the United States Court of Appeals for the Ninth Circuit provides, in essence, that briefs in forma pauperis must be filed in accordance with all of the provisions of the rule. Paragraph 18 (2) requires that briefs shall contain, in the order stated,

(a) A subject index . . . and a table of cases . . . with citations.

(b) A statement of the pleadings and facts disclosing the basis . . . of jurisdiction . . . The statement shall refer *distinctly* to statutory provisions . . . and pleadings.

(c) A concise abstract or statement of the case, presenting *succinctly* the questions involved . . .

(d) A specification of errors.

(e) A *concise* argument of the case. (Italics supplied in above rule.)

It is initially submitted that the brief served on appellee in this case is in flagrant disregard of the above rules. It contains no subject index, no table of cases. It contains no statement of pleading or statutory enactments giving this Court jurisdiction on appeal. And primarily, it contains no *concise* abstract of the case. Instead, twenty-two valuable pages are utilized to present an emotional, biased and unsupported statement of purported facts. There are unverified statements (App. Brief pp. 1, 9, 19) alleging that the trial judge made certain remarks and failed to live up to them—and more basic, the implication that the Judge would have decided an issue at an airport after a few minutes conversation, instead of (as actually happened) a decision in Court after presentation of evidence and argument. Many hundreds of words are used to discuss issues not before this Court (e.g. “Cunningham’s Assault was Unprovoked,” pp. 3, 4, 5, App. Brief). Much time is spent (pp. 6, 9, 11, thru 17, 21) reciting a purported failure of communication between appellant, appellant’s San Francisco counsel (Mr. Lawrence) and appellant’s Guam counsel, Mr.

Duffy. Several pages are used to state why "August 9, 1955, was too Late to Prepare for Trial" (App. Brief pp. 13, 14, 15, 16, 17) although little is said about the many months before that. It should also be pointed out that what purports to be the argument (App. Brief pp. 23-36) is really an amplification of unverified facts. Appellee respectfully contends that wanton abuse of the Rules of Court merits censure and dismissal of the appeal.

II. THE DISTRICT COURT OF GUAM DID NOT ABUSE ITS DISCRETION GROSSLY OR OTHERWISE BY DENYING PLAINTIFF'S MOTION FOR A CONTINUANCE OR FOR A DISMISSAL WITHOUT PREJUDICE UNDER RULE 41(a)(2).

"As the rules governing the exercise of the trial Court's discretion as to the granting or denying of a motion for continuance or a motion for voluntary dismissal without prejudice are the same, the law applicable to both motions will be considered together."

U. S. v. Pacific Fruit & Produce Co., 138 Fed. 2d 367.

Courts have, as an incident to their power to hear and determine causes, the power to grant dismissals or continuances. The fundamental principle running throughout all the cases on this subject is that the granting, or refusal of a court to grant dismissals or continuances, rests in the sound discretion of the Court to which application is made.

Armour & Co. v. Kohlmeyer, 161 Fed 78.

Requests for continuance are usually made on the basis that a party should have a reasonable oppor-

tunity to try the cause upon its merits, but any right thereto must be balanced by a co-relative duty placed upon the plaintiff as indicated in *U. S. v. Pacific Fruit & Produce Co. (supra)* at 372:

“The duty rests upon the plaintiff at every stage of the proceeding to use diligence and to expedite his case to a final determination.”

As will be pointed out more fully in Section III of this argument, the District Court of Guam had before it ample evidence to indicate that the plaintiff below had failed to use diligence and to expedite his case. Good faith is an essential element in seeking a dismissal, continuance, or any dilatory order. Hence, if there are circumstances casting suspicion upon the good faith of the applicant, a motion for continuance or voluntary dismissal should be denied. In this case, the affidavit supporting the motions of August 10, 1955, and August 15, 1955, stated that Russell was out of funds and in the hospital at San Francisco. But a memorandum filed August 15, 1955, from the Master of the ship upon which Russell was employed (see transcript of record) stated that Russell had worked continuously from May 16, 1955, to August 10, 1955, save for eight hours sick leave on August 9, 1955. Upon this information and the additional facts that plaintiff had been warned on April 19, 1955, that no further continuances were likely to be granted, that he would be expected to go to trial in August and furthermore that plaintiff was represented by counsel at all times on Guam and at the hearings on all motions, the District Court of Guam formed a “well

founded belief" that the motions made were merely delaying tactics.

It should also be pointed out that as of August 15, 1955, the defendant in the case below had been subjected to extremely heavy expenses in defending not only the action on Guam, but three other similar actions filed by the same plaintiff in the State of California.

It has been held in *U. S. v. Du Pont*, (N.D. of Ill. 1953) 13 FRD 490, at 497, that a Court can generally grant a dismissal without prejudice, conditioned upon the plaintiff's paying defendant's costs, but it was also held in the *Du Pont* case that since the government was the plaintiff, no dismissal could be granted as the Court was without authority to order costs against the United States and defendant could not be protected therefrom. Such reasoning should certainly apply to any order here granting a dismissal and requiring the plaintiff to pay the defendant's costs. As a practical matter this would be a nullity since the plaintiff had alleged himself on numerous occasions to be a pauper and unable to pay even his own costs. For the Court to have granted a judgment for costs would have been of no effect, as said by the Court in *Homeowners Loan Corporation v. Hoffmann*, 134 Fed. 2d 314:

"The plaintiff contends that the defendant's right to payment of costs by the plaintiff is satisfied by the judgment for costs entered . . . This contention is of no merit. A judgment is not equivalent to payment."

In fact, it could easily be said that granting of the motion under circumstances such as these would in itself have been a gross abuse of discretion.

Appellant has indicated in his brief that under the ruling of *Bolton v. General Motors Corporation*, 180 Fed. 2d 379, that there is an absolute right to dismissal without prejudice under Rule 41(a)(2) FRCP. As indicated in *U. S. v. Du Pont, supra*, this was a minority ruling, contrary to the great weight of authority, peculiar only to the Seventh Circuit. The point is now of no more than historical moment as the Bolton Rule has been expressly overruled in *Grivas v. Parmalee Transportation Co.*, 7th Circuit, 1953, 207 Fed. 2d 334, Certiorari denied, 347 U.S. 913, 74 Supreme Court 477.

It is submitted that a refusal to grant the motion for dismissal without prejudice on August 15, 1955, was amply supported by the evidence and that granting of such motion would have been prejudicial to a defendant who had expended large sums of money for his defense and was at all times ready, willing and able to proceed with the action.

III. THE DISTRICT COURT OF GUAM DID NOT ABUSE ITS DISCRETION BY ORDERING A DISMISSAL WITH PREJUDICE UNDER RULE 41(b).

A. Federal courts have consistently held that it is within the sound discretion of the trial Court to dismiss a complainant's cause of action where the complainant has failed to prosecute his action with rea-

sonable diligence. This power of dismissal for lack of prosecution rests in the inherent powers of the Court and is expressly conferred by Rule 41(b) of the Federal Rules of Civil Procedure.

Barger v. Baltimore & Ohio Railroad, 130 Fed. 2d 401;

Shotkin v. Westinghouse Electric Co., 169 Fed. 2d 825;

Hicks v. Beacon's Moving & Storage Co., 115 Fed. 2d 406;

U. S. v. Pacific Fruit & Produce Co., 138 Fed. 2d 367.

This statement of the law has been very recently affirmed by this circuit in *Eva Rose Boling v. United States of America*, Action No. 14727, 9th CCA decided January 23, 1956. The opinion states:

“The power of the trial court to dismiss a cause where the matter has become stale by virtue of inaction by plaintiff is inherent and has been crystalized by rule.”

It then discusses at some length the hesitancy of Courts to act under this rule, and concludes its discussion of the law with the statement:

“... an order of dismissal for failure to prosecute will never be set aside unless there has been an abuse of discretion, and, of course, such a situation is not presumed.”

The Ninth Circuit has also determined that this abuse of discretion must be a gross abuse. In one of the leading cases on this subject, *Hicks v. Beacon's Moving & Storage Co.*, *supra*, the Court has held at page 409:

“Unless it is made to appear that there has been a gross abuse of discretion by the trial court in dismissing an action for lack of prosecution, its decision will not be disturbed on appeal.”

Or, as stated in *U. S. v. Pacific Fruit & Produce Co.*, *supra*:

“The duty rests upon the plaintiff at every stage of the proceeding to use diligence and to expedite his case to a final determination and unless it is made to appear that there has been a *gross* abuse of discretion on the part of the trial court in dismissing an action for lack of prosecution, its decision will not be disturbed on appeal.” (Italics supplied.)

What then was the record which was before the Court at the time that it granted the dismissal with prejudice on August 15, 1955? The judgment roll indicates that the following evidence and information substantiated the ruling of the Court:

a. The pretrial order of June 4, 1954, wherein appellant stated that the witnesses for the plaintiff and plaintiff himself would testify by deposition.

b. The order for continuance of April 19, 1955, wherein plaintiff was notified to be present in person or by deposition on August 15, 1955.

c. The letter to Judge Shriver from counsel Lawrence and the telegram upon which the affidavit for motion of continuance was based, dated August 9, 1955, which stated that plaintiff Russell was in the hospital and plainly inferred that plaintiff could not be physically present. This telegram, letter and infer-

ence were directly refuted by a memorandum filed August 15, 1955, from the Master of the USNS Fred C. Ainsworth reporting that Russell was gainfully employed from May 16, 1955, to August 10, 1955, and during this period had been on sick leave for only eight hours on August 9, 1955.

It should be particularly pointed out that the plaintiff below had been represented by counsel on Guam at all stages of the proceedings. The appellant now seeks in his brief to perfect his appeal to some degree upon a purported lack of action by or confidence in counsel on Guam. It should be noted (as indicated in Section I of the argument) that appellant's brief on this point, pages 3 to 21, is for the most part completely outside the record. The trial Court had before it an affidavit dated April 13, 1955, in support of its motion for continuance from May 3, 1955, to August, which set forth substantially the same reasons for continuance that appellant urged in August. The Court by its order on April 19, 1955, amply warned the plaintiff that he would be required to proceed to trial four months later. The record and appellant's brief indicate that the appellant was present and had sufficient funds for the taking of lengthy depositions in San Francisco on April 15 and 18 of 1955. The record indicates that the appellant was well aware that he would be on Guam on June 21, 1955, having sailed from San Francisco on June 3. It was obvious to the Court that no action was taken by the plaintiff below to make prior contact with his counsel who was present on Guam, the defendant who was present on

Guam, or the defendant's counsel who was present on Guam to arrange for taking of a deposition of the plaintiff on June 21, 1955.

All of the foregoing was before the Court on August 15, 1955. Counsel for appellant was present and made no attempt to refute them. Can it be said by anyone that the Court's decision was not based on ample evidence?

B. Appellant seems to urge that his failure to proceed in the action below denied him a chance to be heard and this should be blamed on the defendant. A similar argument was raised and refuted in *Olsen v. Muskegan Piston Ring Co.*, 117 Fed. 2d 163, where the Court stated:

"Appellant urges that such a holding (dismissal with prejudice) deprives him of his day in court and penalizes him for the misconduct of his counsel. The effect of his argument is that he has been deprived of his right to a hearing because he was not granted permission to present his case at a later date than that set for hearing. However, the right to a day in court means not the actual presentation of the case, but the right to be duly cited to appear and be offered an opportunity to be heard . . ."

Obviously, the appellant here had many opportunities to be heard, and his failure to do so can in no way be blamed on appellee.

C. The appellant has attempted to emphasize purported statements by the trial Court which mislead Mr. Russell in some manner. It is to be noted and

remembered that the only evidence that Judge Shriver made any statement is the unsupported, self-serving declaration of the appellant. Assuming for the moment that Judge Shriver made any statements outside of the Court, it would be an aspersion on the Judge's official conduct and on the competence of Russell's counsel in Guam to infer that the statement and the effect of such a statement was not taken under full consideration by the Court and given due weight at the time of the hearing two months later. Appellant makes some contention (appellant's brief page 29) that the case of *Peardon v. Chapman*, 169 Fed. 2d 909, has some bearing on this particular issue. It should be pointed out that in that case the Court *at a hearing* had expressly stated to both parties that the matter would go to trial and no dismissal with prejudice would be granted. This is in distinct contrast to the facts presented here where the District Court of Guam warned the appellant by its order of April 19, 1955, that the appellant would be expected to proceed with his action on August 15, 1955, and to be present or testify by deposition.

D. Appellant has further contended that the period of time between the filing of the action herein and its dismissal was not sufficient to warrant a dismissal with prejudice and cites the case of *Neel v. Barbara*, 136 Fed. 2d 69, in support of that proposition. A careful reading of the case will reveal that the basis of the reversal was that the Court had refused plaintiff permission to introduce *any* evidence of his due diligence at the hearing on the motion to dismiss. We sub-

mit that no such permission was here denied by the District Court of Guam and that plaintiff's counsel was free and did submit all relevant data concerning due diligence (or actually lack thereof) of the plaintiff.

The question of time is a relative one. It would be manifestly unfair, for example, to compare the question of the docket on Guam with that of the District Court for the Southern District of New York where delays up to three years are necessary in order to get an action to trial. Guam is a small island. In its first four years of existence the District Court of Guam had fewer than 75 felony cases and these included a large number in which the Court sat in its dual capacity as the Island Court. There were up to the time of the dismissal of this action no jury trials on Guam, with their additional time requirements. There is no waiting for trial of any action on Guam, as pointed out by Judge Shriver in his letter of August 3, 1955 (Appellant's brief, Appendix C) wherein he stated:

"It must be remembered that in this jurisdiction where the docket is not crowded this action has been pending for a period of time greatly in excess of the normal action. The defendant as well as the plaintiff is entitled to a speedy disposition of the case".

Other jurisdictions have frequently upheld dismissals in time periods even less than that with which we are here concerned as for example, *Holcomb v. Holcomb* (USCA DC 1954) 209 Fed. 2d 279 where a

period of ten months was involved and in *Sokolin v. Estes* (USCA DC 1942) 131 Fed. 2d 351, which covered a fifteen month period. The Court in the latter case also stated:

“... counsel had three months in which to take the deposition and otherwise prepare for trial, and his failure to do so was responsible for the dismissal”.

It is respectfully submitted that the time element is of no particular moment here; that the real issue is whether or not the plaintiff below diligently prosecuted this action; that the lack of a crowded calendar on Guam gave appellant numerous opportunities to further his cause; that all continuances were requested by him; and that appellee herein was entitled to a disposition of his case.

E. Appellant has further contended that there is no support in the record for the essential findings of fact and conclusions of law. Appellant takes issue with the Court's finding that plaintiff was in a financial position to have additional depositions taken. The docket record of the Court will show that plaintiff had taken five depositions on Guam in May of 1954. These it is admitted were not favorable to the plaintiff and it can easily be seen why he would like to have additional depositions. The record will show that the lengthy and expensive deposition of Robert L. Peterson taken in San Francisco on April 15 and 18, 1955, was filed with the Court and before it on August 15, 1955. That deposition will show that the plaintiff was personally present and available for the taking

of his own deposition had he so desired and gave ample basis for the Court's finding that the plaintiff was in a financial position to have his own deposition taken. It should also be pointed out that the Court at this time properly took judicial notice of the fact that plaintiff and his San Francisco counsel had previously filed several actions in California, had served appellee Cunningham with process at a time when he was on a vacation in California, had caused Cunningham considerable expense in the taking of depositions in the Guam case and now intended to dismiss the Guam action with the intention of forcing Cunningham to defend himself in a jurisdiction far removed from the scene of the cause of action and from the witnesses' and the defendant's place of residence.

The finding that the plaintiff was not in the hospital is amply supported both by the memorandum from the Master of the USNS Ainsworth (see transcript of record) and the actual statements by appellee as to his physical condition in appellee's brief on appeal.

The burden rests with the appellant to establish that in granting the motion to dismiss the District Court grossly abused the discretionary power with which it is inherently endowed. It is submitted that a review of the record and even a reading of the appellant's brief discloses no conduct on the part of the trial Court that could in any way be considered an abuse of discretion, and the Court below must be affirmed.

IV. REQUIREMENT OF COST BOND AND ALLOWANCE
OF ATTORNEYS' FEES WERE PROPER.

The security for costs required by the District Court of Guam is not an unusual or unconstitutional requirement.

The well settled general rule is that a nonresident plaintiff may be required to put up a bond or other security for costs in accordance with local rules. There is no specific Federal statute governing this matter, but a Federal Court has inherent power to require a nonresident to furnish security for costs and may formulate local rules to deal with this problem.

Caviechi v. Mohawk Manufacturing Co., 27 F. Sup. 981;

Slusher v. Jones, 3 F.R.D. 168;

Fontenout v. Cabot Co., 78 F. Sup. 659.

The granting of costs lies within the sound discretion of the Court. Rule 54(d) of the Federal Rules of Civil Procedure provides that a prevailing party shall be granted costs in all cases unless a statute of the United States or the rules provide otherwise. Costs are not limited to the items specified in 28 USC 1920 but may be supplemented by the Court within its discretion.

It is submitted that the requirement for cost bond and the allowance of costs was proper in the within case.

CONCLUSION.

The record in this case and the emotional arguments propounded by the appellant failed to disclose in any manner that the District Court of Guam abused its inherent judicial power in granting the dismissal with prejudice or in refusing to grant a continuance or motion for dismissal without prejudice. The brief for appellant discloses a complete disregard of the rules of this Court with reference to the requirements for briefs and a failure to indicate any jurisdiction in this Court for the appeal.

The appellee respectfully submits that the appeal should be dismissed for the foregoing reasons or in the alternative that the order of Court appealed from should be affirmed.

Dated, San Francisco, California,
March 19, 1956.

E. R. CRAIN,
THOMAS M. JENKINS,
Attorneys for Appellee.

United States Court of Appeals
for the Ninth Circuit

CHARLES ARNOLD and CHICKEN-EGGS, INC., *Appellants*,

vs.

CLEO P. KING, TRUSTEE IN BANKRUPTCY OF JAMES C.
BOOKEY, SR., JAMES C. BOOKEY, JR., and J. C.
BOOKEY SUPPLY, BANKRUPTS, *Appellee*.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

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United States Court of Appeals

for the Ninth Circuit

CHARLES ARNOLD and CHICKEN-EGGS,
INC., *Appellants,*

vs.

CLEO P. KING, TRUSTEE IN BANKRUPTCY
OF JAMES C. BOOKEY, SR., JAMES C.
BOOKEY, JR., and J. C. BOOKEY SUP-
PLY, BANKRUPTS, *Appellee.*

No. 14944

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEE

I. JURISDICTIONAL STATEMENT

Appellee accepts the statement as to jurisdiction of the District Court and this court set forth on page 1 of appellants' brief.

II. STATEMENT OF THE CASE

This action arises from a bankruptcy proceeding resulting from the filing of an involuntary petition on May 6, 1954. James C. Bookey, Jr., and James C. Bookey, Sr., were partners doing business as J. C. Bookey Supply for some years up through the end of March, 1954 (Tr. 214, 215). The involuntary petition in bankruptcy against the two individuals and the partnership was filed by a creditor and joined by two other creditors. The bankruptcy proceeding was referred to the Referee in Bankruptcy by Honorable William J.

Lindberg, United States District Court Judge, under a general order of reference. The two partners and the partnership were adjudicated to be bankrupts, and Cleo P. King was appointed the Trustee in Bankruptcy of all three.

The Trustee filed petitions for four turnover orders, two of which were denied, and two of which were granted and are involved in this appeal. All four petitions involved related facts and similar respondents so that the hearings of them were consolidated and evidence relating to each was heard at the same hearing, protracted over a period of a month and a half.

Initially, the two petitions (Tr. 2-10) which were granted involved the specific property described therein, but as the hearing continued, additional testimony was introduced by both the appellants and the appellee, leading to a broadening of the issues, and amending of the petitions to conform to the proof (Tr. 17e). As a result, the broad nature of the turnover order was reached and supported by the evidence introduced at the hearing. The appellants petitioned the United States District Court to review the order directing turnover of property to Trustee, and this order was affirmed by the said District Court (Tr. 62-64).

There are three different classes of property involved in the turnover order which is subject to this appeal. To classify them separately for the purpose of reference in this brief, they shall be referred to as follows:

Class A

Office and plant equipment and fixtures in possession of appellants.

Class B

Trucks and automobiles consisting of 1951 Chevrolet, 1948 International truck, 1952 Studebaker truck and 1952 Dodge truck.

Class C

All inventory and stock in trade, cash, bank accounts, moneys, accounts receivable, books of account, ledgers, statements, invoices, records and other assets held by appellant, Chicken-Eggs, Inc.

The Class A property is the subject matter of the petition for turnover order against Chicken-Eggs, Inc.; the Class B property is the subject matter of the petition for turnover order against Charles Arnold and Chicken-Eggs, Inc.; and the Class C property is the subject matter of the entire hearing from the broadened scope as the result of the actual evidence and proof introduced.

III. SUMMARY OF ARGUMENT

A. The District Court was correct in affirming the turnover order entered by the Referee in Bankruptcy, and the Referee in Bankruptcy had summary jurisdiction to hear and determine the rights of the parties under and pursuant to the petitions for turnover orders. The claims of appellants to the property which was the subject matter of the turnover orders were not adverse, but, at best, were colorable only, and were mere shams and pretenses, so patently fraudulent as to be totally without merit.

B. The Bulk Sales Act of Washington (Chapter 63.08 of the Revised Code of Washington) applied to the claimed transfer of the property referred to above

as Class A. The appellants did not comply with the Bulk Sales Act and the transfer was wholly void as against the Trustee in Bankruptcy, leaving the appellants with no adverse claim but a mere colorable one, without merit.

C. There was no consideration for the transfer of the automobiles and trucks, referred to above as Class B, to appellant, Charles Arnold, from J. C. Bookey Supply. The findings of fact of the Referee to the effect that the appellants took naked title to them and had no claim to them with any merit or substance is amply supported by the evidence.

D. The court did not err in finding that appellant, Chicken-Eggs, Inc., was an organization created for the purpose of hiding and concealing assets of J. C. Bookey Supply, and is a continuing operation of J. C. Bookey Supply with no change in actual ownership and control from J. C. Bookey Supply; and the Court did not err in taking jurisdiction of all property of every kind held by Chicken-Eggs, Inc. The findings of fact entered by the Referee clearly support the conclusions of law and order directing turnover of property to Trustee, and said findings of fact were approved by the District Court. The said findings of fact must be accepted by the District Court and this Court unless they are clearly erroneous and manifestly unjust. A review of the entire evidence not only amply supports the findings of fact but compels them as the only correct ones.

E. The appellants received a fair trial and the Referee was not prejudiced prior to and during the trial.

IV. ARGUMENT

A. The Referee in Bankruptcy had summary jurisdiction to hear and determine the rights of the parties under and pursuant to the petitions for turnover orders.

1. Basis of summary jurisdiction.

The basis of summary jurisdiction in this case is that the appellants had no claim to the property involved which was substantially adverse to the claim of the Trustee. Appellee does not deny that physical possession of the property involved (except that described as Class B) had been taken by appellants at the time of the filing of the petition in involuntary bankruptcy. However, the appellants' claim was not a substantially adverse one, as set forth in both petitions (Tr. 4, 8) and supported by Paragraph XVII of the findings of fact (Tr. 26). Thus, the claim of appellants not being a substantial adverse one, but at most merely colorable without merit, the Referee in Bankruptcy had summary jurisdiction in the case.

2. Findings of fact bearing on nature of claim of appellants.

After a full hearing, the Referee in Bankruptcy found that the property described as Class B had been transferred by J. C. Bookey Supply to appellant, Charles Arnold, for no consideration whatever (Tr. 22); that the property described as Class A had been transferred by J. C. Bookey Supply to appellant, Chicken-Eggs, Inc., in direct violation of the Bulk Sales Act of Washington, *supra*, and that the transfer was therefore absolutely void (Tr. 23); that the prop-

erty described as Class A and Class C was in fact held by appellant, Chicken-Eggs, Inc., for the purpose of hiding and concealing the same from the creditors of the bankrupts and the Trustee in Bankruptcy (Tr. 25); that appellant, Chicken-Eggs, Inc., was in fact a continuing operation of J. C. Bookey Supply with no change in actual ownership and control from the bankrupts (Tr. 25); and that none of the appellants had any claim to any of these assets adverse to that of appellee, and at most their claim was merely colorable without merit (Tr. 26).

The findings of fact made by the Referee should be given great weight; and particularly is this true when the evidence is conflicting and inconsistent and the credibility of the witnesses must be subjected to extremely close scrutiny. It is provided in Rule 47 of General Orders of Bankruptcy that:

“Unless otherwise directed in the order of reference, the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. . . .”

This general order, and the weight to be given the findings of fact of the Referee have both been discussed in many cases, and the general rule evolved from all of these cases, as set forth in 2 Collier on Bankruptcy, Cumulative Supplement, page 189, is that the findings of fact by the Referee are conclusive upon review by the District Court unless clearly erroneous, and should not be disturbed by the District Judge unless there is a most cogent evidence of mistake or miscarriage of jus-

tice. This rule is then supported by numerous cases cited therein. Examples of the application of this rule are found in *In re Musgrave*, 27 F.Supp. 341 (N.D. W.Va. 1939), wherein the court held that where findings of the Referee are based on conflicting evidence involving questions of credibility, and the Referee has heard the witnesses and observed their demeanor, great weight attaches to his conclusions, and the weight of authority is, that the District Judge, while scrutinizing with care his conclusions on review, should not disturb his findings unless they are manifestly unsupported by the evidence; and in the case of *Kowalsky v. American Employers Ins. Co. of Boston, Mass.*, 90 F.(2d) 476 (6th Cir. 1937) wherein the court held it should not disturb the findings of the Referee upon disputed issues of fact unless there is a most cogent evidence of mistake and miscarriage of justice.

In the present case, the District Court Judge recognized this rule, stating in his memorandum decision (Tr. 60) that:

“It is a well established rule that upon review of a decision of a Referee, based upon his conclusions on questions of fact, especially where the credibility of witnesses whose testimony has been heard by the Referee was involved, the District Judge should not disturb the findings unless there is cogent evidence of mistake and miscarriage of justice. . . . ”

and citing 2 Collier on Bankruptcy, page 1499, and *Ott v. Thurston*, 76 F.(2d) 368 (9th Cir. 1935). He also stated in the memorandum decision (Tr. 60) that he

had laboriously reviewed the whole transcript of the proceedings before the Referee, the pleadings, orders, Referee's decision, findings of fact, conclusions of law, and briefs of counsel, and that from the examination of the whole record the Court was convinced that appellants' adverse claims were not real or substantial but merely colorable.

3. Rule for basis of summary jurisdiction.

There would seem to be little dispute as to the basic rule regarding the right of the Bankruptcy Court to exercise summary jurisdiction. One of the leading cases on this point, which is cited in appellants' brief, is *Harrison v. Chamberlin*, 271 U.S. 191, 70 L.Ed. 897, 46 Sup. Ct. Rep. 467 (1926). The rule as set forth therein is as follows:

“It is well settled that a court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding, a controversy in reference to property held adversely to the bankrupt's estate without the consent of the adverse claimant, but resort must be had by the trustee to a plenary suit. However, the court is not ousted of jurisdiction by the mere assertion of an adverse claim, but having the power in the first instance to determine whether it had jurisdiction to proceed, the court may enter upon a preliminary inquiry to determine whether the adverse claim is real and substantial, or merely colorable, and if found to be merely colorable, then the court may then proceed to adjudicate the matter summarily * * * ”

Thus, the Bankruptcy Court has a preliminary right to investigate into the matters to determine whether

there is a substantial adverse claim, and if not, and the claim is merely a colorable one which is unsubstantial, a sham, or without merit, the Bankruptcy Court may proceed with its summary jurisdiction and determine the issues on the merits. The erroneous construction appellants and their attorneys are placing upon this rule is the contention that once a claim is made by a third party, that in and of itself is a “substantial adverse claim” and the Bankruptcy Court is ousted of summary jurisdiction, without regard to the nature and substance of the claim. This is totally wrong, and if the claim of the third party is shown to be unsubstantial and merely colorable, the Bankruptcy Court may proceed with summary jurisdiction. The real issue in this case in regard to this point is and should be whether the claim of the third parties is a “*substantial* adverse claim” or merely a colorable one.

The appellants have cited many cases in pages 9 through 14 of their brief as bearing upon this point and supporting the view that the Bankruptcy Court does not have summary jurisdiction in connection with property in the hands of third persons who have a substantial or bona fide adverse claim. However, in each of the cases cited by appellants, the ultimate finding was that the third person did have a substantial adverse claim and the cases cited by appellants support the rule that if the adverse claim is a mere colorable one, the Bankruptcy Court retains summary jurisdiction. All of these cases, including the leading one of *Harrison v. Chamberlin*, *supra*, support the rule that if a claim is made, the Court must investigate to determine if it is

real and substantial or merely colorable, and the Bankruptcy Court has summary jurisdiction in cases where the third party claim is merely a colorable one.

The question to be decided here, and which the appellants are by-passing, is whether the claim of appellants is a substantial adverse one or whether it is merely colorable. On the basis of all of the evidence introduced at the hearing, the Referee was of the opinion the claim of appellants to the property was at best colorable, and findings of fact, to this effect supported by the evidence, have been entered. Appellants have failed to cite any cases with facts similar to the ones present in this case wherein a determination has been made that the claim of the third parties is a substantial adverse one and that summary jurisdiction is improper. There are many reported cases with facts or situations similar to the present one wherein it has been determined that the claim of the third parties was so ridiculous or fraudulent as to be a mere sham or pretense, and at best a colorable one, with no substance, and summary jurisdiction has been exercised by the Court.

One of the leading cases which has facts so similar to the present one that it may be wondered whether the appellants patterned their conduct after this case, is *Cotsirilos v. Klein*, 115 F.(2d) 626 (7th Cir. 1940). The facts of this case were that John Gallis and James Gallis, bankrupts, formed a partnership with Eleftherios Cotsirilos and engaged in the egg business. Shortly before the enterprise failed and ceased doing

business, the members distributed the assets they had on hand and left numerous sizeable claims wholly unpaid. The sum of \$1,500 in cash was turned over to John Cotsirilos, the father of Eleftherios Cotsirilos. The Referee in Bankruptcy found that the transfer of the \$1,500 to the father of one of the partners was for the purpose of concealing the assets of the partnership from its creditors and the Trustee in Bankruptcy. He further found that John Cotsirilos did not have a substantial adverse claim to the said \$1,500, and that his claim was without any color. This was despite the fact that John Cotsirilos claimed the money belonged to him, that his claim was a substantial adverse one to the trustee, and that summary jurisdiction was improper. On appeal, the Circuit Court was of the opinion that from a reading of the entire record, the conclusion was tolerably clear that there was substantial evidence to support the two findings of the Referee.

It then went on to outline the pattern of practice which had taken place while the partnership was engaged in the egg business. It pointed out that the business was in trouble and debts began to oppress. The situation grew worse; books were lost, misplaced or destroyed; debts increased; debtors were numerous and became more insistent in collecting their debts; suits were begun; some creditors attached and others garnished. The Court then concluded that in this situation, someone, either the partners, or the father of one of the partners who received the money conceived the idea of ending it all by turning over the assets or all of the worthwhile assets to the said father, and the plan

was carried out. The Court pointed out that the Referee saw the witnesses and heard their stories at length, and that he was in a much better position than it to pass on their credibility. It added that the case was one which turns on credibility and that the deliberate judgment of the referee was entitled to great weight and must be accepted by it. The Court then stated that it was clear that if the Referee's first finding was accepted, he was justified in concluding the adverse claim was not real and substantial, but merely colorable, and was therefore justified in acting in the summary proceeding.

The instant case is almost identical to the foregoing, and it was on a very similar basis that the Referee reached his conclusion, based on all the evidence after weighing the credibility of the testimony of the witnesses, that the adverse claim was not real and substantial but merely colorable.

This type of situation has been passed on by the Supreme Court of the United States, and it has adopted the view that if the adverse claim is so fraudulent and collusive as to be a mere sham and pretense, it is without substance and summary jurisdiction is proper. In the case of *May v. Henderson*, 268 U.S. 108, 69 L.Ed. 870, 45 Sup. Ct. Rep. 456 (1925), the Court dealt with a summary proceeding for the recovery of funds paid to a bank on a note held by it during a preferential period. It pointed out that the findings of the Referee and the evidence left no doubt that the surrender of the money to the bank and the attempted application of the

money by the bank to the payments of its note was collusive and without any substantial basis of legal right. It went on to say:

“At most it was clumsy, ineffectual and fraudulent effort to divert the funds of the bank to the payment of a favored creditor. While it is now settled that the claim of an assignee for the benefit of creditors of the right to charge in his account expenses incurred or expenditures made prior to the filing of the petition in bankruptcy is an adverse claim which cannot be adjudicated in a summary proceeding, we think the rule cannot be extended to a case such as this, for the claim is merely colorable, and on its fact made in bad faith and without any legal justification.”

Thus, although the claim on its face may be of such a type as to require a plenary action, if the determination of the nature of a claim shows it is completely fraudulent, or collusive, or made in bad faith, without any legal justification whatsoever, for the purpose of perpetrating a fraud, it will be without substance and summary jurisdiction will be proper. In the present case, that is precisely what the facts showed, and it was on that basis that the Referee found he had summary jurisdiction, entered his findings of fact, and his order.

Another case in which the Court was faced with a situation similar to the present one is *Autin V. Piske*, 24 F.(2d) 626 (5th Cir. 1928). In this case Ernest Autin and Phillip Autin were brothers and partners in a business. The business store burned and insurance

proceeds were paid to them. The insurance proceeds were placed in the safe of a third brother, Clay Autin. Shortly thereafter Clay Autin purchased a new store and not long after the purchase, Phillip Autin, one of the original partners, was placed in charge of this store. Phillip Autin claimed that he took the cash representing the insurance proceeds from the safe of Clay Autin to make payment to a creditor, and while on the public road he was robbed. Clay Autin claimed he used his own money to purchase the new store and did not have the use of any of the insurance proceeds from the burning of the old store. It was shown that he earned \$40 to \$46 per week; that he had no property except the store he claimed to have purchased; that he had a small bank account at one time but could not remember where it was nor the name of the bank; that he had no bank account at the time of the purchase of the new store. He testified he had always kept three to four thousand dollars in cash in the safe as he bought and sold second-hand automobiles, but he could only show the sale of one automobile in the past.

The Circuit Court held that the testimony of Phillip Autin in regard to the robbery was so vague and indefinite of itself, and so improbable that it was unworthy of belief and the Referee was justified in rejecting it entirely. It also said that the same was true of Clay Autin's testimony on the accumulation of cash. The inevitable deduction was that the store was purchased with the insurance money and the taking of title to the grocery store in the name of Clay Autin was a

pure simulation. The Court concluded that the District Court had jurisdiction of the controversy and was authorized to decide it in a summary manner. Once again, these facts are very similar to the present case and the decision and ruling were on an identical basis with that made by the Referee in this case.

Numerous other cases where the same rule has been adopted and applied are as follow:

(1) *In Re Berkowitz*, 173 Fed. 1013 (D.N.J. 1908). At a time shortly before the petition in bankruptcy was filed, the bankrupt and three brothers-in-law formed a new corporation, and the bankrupt conveyed all of his assets to it for an alleged consideration of \$1,500. The proceeding was a summary one to have all of the assets of the corporation turned over to the trustee in bankruptcy. The court found the brothers-in-law had made no inquiry concerning the quantity or value of the property transferred to the corporation; that the corporation was intended to operate as a cloak to shield the property from seizure by creditors of the bankrupt and was obviously a fraud on the creditors. The order of the referee directing the receiver to seize the property in possession of the corporation in the summary proceeding was affirmed by the District Court.

(2) *In Re Robinson*, 42 F.Supp. 342 (D.C. Mass. 1941). In a summary proceeding, the Trustee attempted to recover real property deeded by the bankrupt to a trustee who was allegedly a creditor of the bankrupt. The referee found the trustee taking the property had no bona fide intention to secure any loans to the bankrupt, and that he held a

bare legal title without control and that beneficial interests remained in the bankrupt. The bankrupt controlled the property and subsequently treated it as his own. There was no written evidence of the existence of any debt from the bankrupt to the trustee and no logical explanation was offered for its non-existence. In view of the relation of the parties and under the circumstances, the District Court felt the referee was warranted in finding the claim merely colorable; that it was so unsubstantial and obviously insufficient, either in fact or in law, as to be plainly without color or merit, and summary jurisdiction was proper.

(3) *Shaw v. Thompson*, 184 F.(2d) 572 (5th Cir. 1950). After a full hearing as to whether a purported transfer of an automobile by the bankrupt was genuine or colorable, the referee found it colorable and exercised summary jurisdiction. In reviewing the action of the referee, the Circuit Court, after stating that the correctness of the referee's assertion of jurisdiction depended on the correctness of his findings of fact, went on to state:

“The case smacks so much of, the circumstances present so many badges and indicia of, fraud that despite the direct testimony to the contrary, the court was authorized to, and did, reject it as untrue. Indeed the finding of fraud seems almost to have been demanded. The exercise of summary jurisdiction was proper.”

(4) *In Re Crescent Box Mfg. Corp.*, 46 F.Supp. 140 (E.D. N.Y. 1942). Accounts receivable were assigned by a bankrupt corporation during insolvency to the estate of a decedent which was the controlling stockholder and director of the corpora-

tion, as security for prior advances. This left the corporation with assets of \$155 against liabilities of \$24,000. The court found the asserted title was not in the status of a substantial adverse claim but in effect colorable. The court held that the assertion that the claim is adverse may be disregarded if on the undisputed facts it appears to be merely colorable.

(5) *In Re Permanent Mortgage Corp.*, 5 F.Supp. 957 (S.D. N.Y. 1933). The court held that it is proper to summarily order property held by parties claiming adversely to the trustee to be surrendered to the trustee where the claim is no more than colorable. The court said this rule is applicable to the case of property conveyed by a bankrupt to a wholly owned subsidiary where the conveyance is palpably void as to creditors or where the business of the subsidiary is so managed that it is merely an agent, adjunct or instrumentality of bankrupt.

(6) *In Re Kansas City Journal-Post Co.*, 144 F.(2d) 819 (8th Cir. 1944). The president of the bankrupt corporation withdrew \$75,900 from it prior to its adjudication in bankruptcy and used the money for himself to purchase property. In resisting the summary action, he claimed that he had a right to withdraw and use the money by virtue of contractual relationships with the corporation. The court found that the money always belonged to the corporation and that the claimant had no right to withdraw it. It further found that his contention of being an adverse claimant, did not, under the circumstances, present some fair doubt and reasonable room for controversy but was a mere pretense and utterly without any legal

justification, and the action of the referee under the summary procedure was upheld.

(7) *White v. Bernard*, 29 F.(2d) 510, (1st Cir. 1928). The bankrupt deeded certain property to his brother prior to bankruptcy, and the trustee claimed the conveyance was without consideration and for the sole purpose of concealing the property from the trustee. The court held the referee had power, notwithstanding the assertion of the adverse claim of the brother, to determine whether the claim was substantial or merely colorable, and to go into the merits of the case so far as necessary to the determination of such matter.

(8) *First National Bank of Negaunee v. Fox*, 111 F.(2d) 810 (6th Cir. 1940). The court held a summary proceeding may be invoked to compel a bank to pay to the bankruptcy trustee deposits in the bank's possession belonging to the bankruptcy estate where the bank's adverse claim is colorable only.

(9) *In Re Knott*, 134 F.(2d) 833 (6th Cir. 1943). The court ruled that where the evidence establishing the claim of a transferee to whom the bankrupt transferred paper title to an automobile was so unfounded as to be colorable, the transferee was not entitled to a trial in a plenary suit and the bankruptcy court had jurisdiction to issue a turnover order in summary proceedings.

(10) *Blackwell v. Chambers*, 194 F.(2d) 750 (7th Cir. 1952). In discussing summary jurisdiction, the court said as follows:

“ * * * The mere assertion of a claim does not make one an adverse claimant entitled to a plenary action * * *. The bankruptcy court is always

clothed with jurisdiction to determine the preliminary question whether an alleged adverse claim to title is such in fact or is only colorable, and in the latter case to exercise summary jurisdiction over the claimants * * * ”

(11) *In Re Rock Spring Water Co.*, 140 F.(2d) 566 (3rd Cir. 1944). In this case, a chattel mortgage was executed by the bankrupt prior to bankruptcy to a person named Singer. The New Jersey statute required an affidavit of consideration to be attached to the mortgage and to state truthfully and completely the consideration for the mortgage. This was not done, and under the New Jersey law the chattel mortgage was then void. Singer claimed to hold the property as an adverse claimant to the trustee in bankruptcy and asserted that summary proceedings were not proper. In view of the fact that the New Jersey law made the chattel mortgage completely void, and the facts clearly showed this, the court stated that admitting Singer had possession of the property, “the claim of the appellant (Singer) to the chattels is purely colorable and involves no fair doubt or reasonable room for controversy,” and it upheld the validity of the summary proceeding.

4. Facts in present case bearing upon the nature of appellants’ claims.

The bankrupts, James C. Bookey, Jr. and James C. Bookey, Sr. were operating an egg business as a partnership, J. C. Bookey Supply. The operation of this partnership commenced in the fall of 1952. By the end of 1953 the partnership was heavily in debt and by the end of March, 1954, it found it impossible to continue

operating the business. Creditors were severely pressing it, and ultimately a suit was commenced by one creditor on April 6, 1954.

While this financial crisis was developing, the bankrupts saw fit to transfer all of the assets of the business consisting of the property referred to in this brief as Class A, Class B and Class C to the appellants herein. The transfer of the property described as Class A was purportedly a sale of that property to Chicken-Eggs, Inc. Admittedly, Chicken-Eggs, Inc. was not incorporated at this time, and the appellants claimed it was an organization being operated by Samuel H. Plumer, the father-in-law of the bankrupt, James C. Bookey, Jr., and Charles Arnold, an ex-employee of the bankrupt, J. C. Bookey Supply. The purported consideration for the sale was a promissory note from Chicken-Eggs, Inc. to J. C. Bookey Supply for \$900 and the assumption of an existing conditional sale contract (Tr. 160). No bill of sale was ever executed or filed (Tr. 318); there was no compliance with the bulk sales law of the State of Washington (Tr. 265); the alleged purchasers made no investigation regarding the status of the title of the property allegedly purchased, and gave no notice of any kind to the public or to persons who had been dealing with J. C. Bookey Supply that a sale had taken place (Tr. 317, 318); no evidence of any kind was introduced to show that there were any open manifestations of a transfer of the business or sale of the assets; the assets remained in the same place as they had prior to the sale and the business was conducted in the same manner and the same

place as it had been prior to the alleged sale (Tr. 327, 328). The bankrupt, James C. Bookey, Jr., remained in possession and control of the assets in the business, and admits to the managership of the alleged new organization which claims to have purchased the assets (Tr. 204). Through this guise of transferring the said assets to an alleged new organization, an effort has been made to conceal them from the trustee in bankruptcy and they have been at all times and now are within the control and direction of the bankrupt, James C. Book-ey, Jr., who in fact never made any valid transfer of them.

At or about the same time and during the month of March, the property described herein as Class B was transferred to Charles Arnold, an ex-employee of J. C. Bookey Supply, purportedly for the payment of back wages due him. There were in fact no back wages due him from J. C. Bookey Supply (Tr. 325); the books of J. C. Bookey Supply showed no wages due him (Tr. 325-326) and the testimony of Charles Arnold and James C. Bookey, Jr. showed clearly there was no obligation of any kind due him from J. C. Bookey Supply (Tr. 233-235; 325-327); the said Charles Arnold then turned this property over to Chicken-Eggs, Inc., which used it from the time he acquired it until he withdrew from Chicken-Eggs, Inc. (Tr. 327-328). The claim has been made the said property was then purchased from him by Chicken-Eggs, Inc., but no substantial evidence was introduced to show any valid purchase; Chicken-Eggs, Inc., its officers and the men connected with it were all aware the property had been

transferred to the said Charles Arnold for no valid consideration, and took it from him for no consideration (Tr. 293-300; 328-331); as a result, the property was transferred away by J. C. Bookey Supply and ultimately returned to Chicken-Eggs, Inc. which is managed by James C. Bookey, Jr., and thus the property is within the control and management of James C. Bookey, Jr., and the transfer was a mere paper transfer, again for the purpose of concealing the assets from the trustee.

The property described as Class C consisting of inventory and stock in trade of J. C. Bookey Supply was allegedly sold to the organization of Chicken-Eggs, Inc. for the sum of \$600 (Tr. 300-303). No investigation was made as to title of the property or its value (Tr. 307); testimony at one time indicated an inventory had been taken and destroyed and later indicated the inventory was in existence (Tr. 303-307); no inventory of the property purchased was ever furnished the court or introduced in evidence and the testimony as to its acquisition was extremely conflicting. Many accounts were paid J. C. Bookey Supply in the form of checks from creditors and these checks were endorsed and turned over to the organization known as Chicken-Eggs, Inc. (Tr. 265-266; 330-332); Samuel H. Plumer claims to have contributed cash to Chicken-Eggs, Inc. and purchased all of these checks from James C. Bookey, Jr., but his testimony as to this was extremely conflicting and lacked credibility (Tr. 268-271; 282-287; 290-293); no records of any kind nor documentary evidence were presented to show any valid purchase or

acquisition of the accounts receivable of J. C. Bookey Supply by Chicken-Eggs, Inc.; all transactions were claimed to have been done in cash in such a manner as to make it impossible for the transactions to be examined and traced; the explanation of Samuel Plumer as to the source of the cash was very conflicting and in total so inconsistent, and the facts testified to so incredible and impossible that no weight could be given it, and as stated in the referee's memorandum opinion, the cash "did not exist in fact and was a figment of the imagination in the mind of Plumer" (Tr. 17j). However, by this route, all of the inventory and stock and stock in trade and accounts receivable of J. C. Bookey Supply and moneys due it were transferred to the alleged new organization, Chicken-Eggs, Inc. which is in fact a continuation of J. C. Bookey Supply.

The net result of all of the foregoing transfers was to place all of the assets of the partnership, J. C. Bookey Supply in an organization allegedly composed of the father-in-law and ex-employee of one of the bankrupt partners, which later incorporated under the name of Chicken-Eggs, Inc. and which at all times was within the management and control of James C. Bookey, Jr., one of the bankrupts. There was in truth and fact, at no time any valid transfer or sale of the assets of J. C. Bookey Supply, and the organization known as Chicken-Eggs, Inc. is in fact a continued operation of J. C. Bookey Supply with no change in actual ownership and control from the bankrupts, and all of its assets belong to and should be turned over to the trustee in bankruptcy of J. C. Bookey Supply.

5. Conclusion.

The facts of this case are very similar to those set forth in all of the cases cited above, and just as in each of those cases the trier of the facts found the transfers to be mere pretenses and shams, without merit or substance, the referee in this case has found the alleged transfers to be totally fraudulent and without merit, for the sole purpose of concealing and hiding the assets of the bankrupt estate. As in those cases, where it was found that the claim of the third parties was without substance and colorable at best, and the summary jurisdiction of the bankruptcy court was upheld, the referee has in this case found the claims of the appellants to be without substance and merely colorable, and has exercised summary jurisdiction in entering the turn-over order. The actions of the referee and his findings of fact and conclusions of law are amply supported by the above authorities and by the facts in the present case.

B. Under the Bulk Sales Act of the State of Washington, the transfer of property referred to above as Class A was absolutely void as against the Trustee in Bankruptcy, and the claim of appellants to the property is without merit and not substantially adverse to that of the Trustee.

1. General application of Bulk Sales Act.

Under the Bulk Sales Law of the State of Washington, as amended in 1953, and as set forth in Section 63.08.020 of the Revised Code of Washington, it is provided that:

“Every person who bargains for or purchases all or substantially all of any stock of goods, wares, or merchandise, * * * or all or substantially all of the fixtures and equipment used in and about the business carried on by the vendor, in bulk, * * * shall, before paying the vendor * * * or delivering to the vendor * * * any of the purchase price thereof, or any promissory note or other evidence of indebtedness therefor, demand of and receive from the vendor * * * a statement in writing * * * giving the names and addresses of all persons to whom the vendor is indebted for or on account of services, commodities, goods, wares * * * used in or about or furnished to the business of the vendor * * * ”

It is further provided in Section 63.08.050 of the Revised Code of Washington that:

“Whenever a person bargains for or purchases all or substantially all of a stock of goods, wares, or merchandise, * * * or all or substantially all of the fixtures and equipment used in and about the business of the vendor, in bulk, for cash or credit, and pays any part of the purchase price, or executes, or delivers to the vendor thereof, or to his order, or to any person for his use, a promissory note or other evidence of indebtedness for the purchase price, or any part thereof, without having demanded and received from the vendor or from his agent, the statement hereinafter provided for * * * and without filing the statement in the office of the county auditor at least seven days before the consummation of the purchase, the sale or transfer shall be fraudulent and void as to creditors of the vendor, of the character to be included in the statement * * * ”

Under these statutes, a sale or transfer of all or substantially all of the fixtures and equipment used in and about the business carried on by the vendor is fraudulent and void as to creditors if the vendee (1) does not demand and receive from the vendor a statement in writing giving the names and addresses of trade creditors of the vendor; and (2) does not file the statement in the office of the county auditor at least seven days before consummation of the purchase. This is not limited to retailers but applies to all businesses.

Under Section 70(e) of the Bankruptcy Act, 11 U.S.C. Section 110, a transfer which, under the state law, is fraudulent as against or voidable for any other reason by a creditor of the debtor, having a claim provable under the Bankruptcy Act, is null and void as against the trustee.

2. Application of the Bulk Sales Act of Washington to the facts in the present case with respect to the transfer of property referred to above as Class A.

The transfer of the property referred to as Class A constituted a transfer of all of the office and plant equipment from J. C. Bookey Supply to Chicken-Eggs, Inc. as found by the referee under finding of fact No. VII (Tr. 22). The alleged contract for the sale of office and plant equipment from J. C. Bookey Supply to Chicken-Eggs, Inc. was introduced as Exhibit No. 3 in the hearing, and recites it is "covering sale of all plant and all office equipment of the J. C. Bookey Supply Co., 17000 Aurora" (Tr. 219). James C. Bookey, Jr. testified that this exhibit was the only contract for the sale of the office and plant equipment (Tr. 219).

The substance of Samuel Plumer's testimony on this point in the hearing on September 9, 1954, was that Chicken-Eggs, Inc., bought the office fixtures and furniture and plant fixtures and equipment of J. C. Bookey Supply; that he had been working for J. C. Bookey Supply prior to the purchase and knew what was being used in the business and the property purchased was the same "stuff" (Tr. 159-166). The following testimony is almost conclusive on this point (Tr. 165):

"Q. (MR. MADISON) So that you got substantially all of the office fixtures and the plant equipment that they were using?

A. (MR. PLUMER) Yes, we paid a good price for it too.

Q. I am not asking what you paid for it, but you got substantially all of that?

A. Correct.

Q. And J. C. Bookey Supply had been engaged in the business of buying and selling and dealing in goods, to-wit, eggs?

A. Correct."

The foregoing testimony occurred in the morning on September 9th, apparently before the appellants had considered the effect of the Bulk Sales Law on the transfer, and thereafter, they attempted to claim the purchase was for a very small portion of the total assets of J. C. Bookey Supply. Even so, the testimony still showed the alleged sale was of substantially all the office and plant fixtures and equipment of J. C. Bookey Supply. At the continued hearing on September 30,

James C. Bookey, Jr. attempted to change his testimony to the effect that he sold only a portion of the assets of J. C. Bookey Supply to Chicken-Eggs, Inc., that being all of the assets he had left, but claiming a lot of property was sold earlier (Tr. 215). Several opportunities were given him to testify as to the other property he had sold, the name of the purchaser and the amount for which it was sold. Both the attorney for the petitioner and the referee gave him an opportunity to do so, and in addition the referee gave him an opportunity to bring any written list showing such information (Tr. 220-227; 242-244). No written list was submitted and the only testimony which Mr. Bookey gave concerning other sales of property of J. C. Bookey Supply was that he sold a Precisa Adding Machine to "a fellow that come in there one day to sell us some new ones" (he didn't know his name and was paid in cash) (Tr. 221); a feed mixing machine to "a farmer up in Burlington" (he didn't remember when or the name of the purchaser or the amount paid for the machine) (Tr. 222); a grain conveyor motor to "the same farmer that I sold the mixer to" (Tr. 224); and some rollers and hand trucks to "different people that would come in there who I was dealing with, and hand trucks and a lot of miscellaneous odds and ends" (Tr. 226).

In addition to the above testimony, Mr. Plumer testified that Chicken-Eggs, Inc. purchased all of the office and plant fixtures and equipment "in the place" (Tr. 263).

The only conclusion which can be reached is that the

transfer did involve all or substantially all of the fixtures and equipment of J. C. Bookey Supply.

It is undisputed that appellants did not obtain the statements or make the filings required by the Bulk Sales Act, set forth above (Tr. 164; 264-265). Appellants make no claim in their brief that there was any compliance with the said Bulk Sales Act, but attempt to answer this question by claiming it is not applicable to the transfer, when by its express terms it applies directly to this type of a transfer.

The application of the Bulk Sales Act to this transfer makes it absolutely fraudulent and void as against the trustee in bankruptcy, leaving the appellant with no substantial adverse claim. The situation is exactly like that in the case of *In Re Rock Spring Water Co.*, *supra*, where the New Jersey statute made a chattel mortgage void if certain affidavits were not attached to it. The affidavits were not attached, and a summary action was brought to recover the mortgaged property from the mortgagee. The mortgagee claimed to hold the property as an adverse claimant, but the court held that in view of the fact that the New Jersey law made the chattel mortgage completely void, and the facts clearly showed this, the claim of the mortgagee was purely colorable and involved no fair doubt or reasonable room for controversy, and summary jurisdiction was authorized. Applying this rule to the present case, the Bulk Sales Act of Washington makes the transfer of the property referred to as Class A absolutely fraudulent and void as against the trustee, leaving the appellants with no adverse claim, but one which is merely

colorable, and the referee in bankruptcy was correct in exercising summary jurisdiction and ordering this property turned over to the trustee.

3. Authorities cited by appellants on pages 25-32 of their brief are inapplicable.

The case of *Connecticut Steam Brown Stone Co. v. Lewis*, 86 Conn. 386, 85 Atl. 534 (1912) cited by appellants on page 26 of their brief, deals with the effect of a Connecticut statute which is entirely different from the applicable Washington statutes, and it has no bearing whatsoever upon the Washington law. The statute in that case provided:

“When any person who makes it his business to buy commodities and sell the same in small quantities for the purpose of making a profit shall, at a single transaction, not in the regular course of business, sell, assign, or deliver the whole or a large part of his stock in trade, such sale shall be void as against all persons who are his creditors at the time of such sale, assignment, or delivery, unless he shall * * * ”

The Connecticut court apparently interpreted the language in this statute referring to “in small quantities” as indicating an intention for it to be applicable to retailers only, but there is no such language in the Washington statutes and the interpretation of them has not been in any way comparable to the Connecticut interpretation of its particular statute.

The cases cited by the appellants on page 27 of their brief referring to bulk sales statutes of the particular states involved as applying to stocks of merchandise

only and having no application to the sale of machinery, tools, finished articles and raw material again have no bearing upon the Washington statute. The provisions of the Washington Bulk Sales Act are clear and no such interpretation has been applied to it by the Washington court. In addition, the activities of J. C. Bookey Supply were the buying and selling of eggs—directly within the language of the Washington statute, and clearly void by its terms.

The case of *Fudge v. Brown*, 126 Wash. 475, 218 Pac. 251 (1923), cited by appellants on page 29 of their brief, has no applicability, for admittedly only a portion of the stock owned by the seller was involved in the sale. Likewise, with the case of *Blanchard Company v. Ward*, 124 Wash. 204, 213 Pac. 929 (1923) wherein the sale amounted to between five and seven per cent of the total stock carried by the seller. The case of *Garner v. Thompson*, 161 Wash. 317, 296 Pac. 1043 (1931) again involved only a portion of the goods of the seller and in addition dealt with a restaurant at a time when restaurants were not included within the language of the Washington Bulk Sales Act. In the present case, the evidence is very clear that the transfer involved all or substantially all of the fixtures and equipment of J. C. Bookey Supply, and was directly within the language of the Bulk Sales Act, and the above cases dealing with portions of stock or fixtures and equipment have no applicability to the present situation.

The last two cases cited by the appellants on page 31 of their brief are also totally inapplicable to the present situation. The case of *Osawa v. Onishi*, 33 Wn.(2d)

546, 206 P.(2d) 498 (1949) dealt with an action brought under Chapter 19.40 of the Revised Code of Washington dealing with fraudulent conveyances and had nothing whatsoever to do with the Bulk Sales Act. The case of *Minder v. Gurley*, 37 Wn.(2d) 123, 222 P.(2d) 185 (1950), dealt with the necessity of introducing evidence as to the value of property transferred in violation of the Bulk Sales Act, where a money judgment was requested in the absence of the ability of the purchaser to return the goods, and again has no applicability to the present situation where the property which was subject to the transfer is capable of return by the appellants who hold it. Only if the appellants had disposed of this property and a money judgment were requested would the value of this property have any bearing or would this case be applicable.

C. The court did not err in finding there was no consideration for the transfer of the property referred to as Class B from J. C. Bookey Supply to appellants and in finding the appellants had naked title only to this property, without any meritorious or substantial adverse claim.

1. Facts pertaining to the transfer of the property described as Class B.

In substance, James C. Bookey, Jr. testified this property was transferred to Charles Arnold, an ex-employee, for a labor claim, but he admitted that the books of account of J. C. Bookey Supply showed there was nothing due Charles Arnold and that there was no written evidence or agreement for the payment of any sum to Charles Arnold for labor (Tr. 233-234). The most

he testified to to show any kind of a claim was that in 1952 he told Arnold, "Chuck, I can't take care of you now because I haven't got it. We will keep track of it and when that day comes when I can take care of you, I will do it." (Tr. 234) There was no explanation as to what "it" meant.

In substance, Charles Arnold testified he was given the trucks for back wages, but admitted he was not actually owed money and there was nothing in the books to show back wages due him; that there was no note or written agreement or evidence of back wages due him (Tr. 324-326). The most testimony he could give regarding his claim was that, "he (Bookey) was going to pay me or make it good to me," and, "well, if he was able to, yes" (Tr. 325-326). His further testimony was that there was no sum ever agreed upon and he admitted he had testified before Bookey had told him he might give him a lot or maybe a little, depending on how much money he could get (Tr. 337).

Mr. Arnold testified that the trucks were used in the business of Chicken-Eggs, Inc.; that the business was the same type of business that J. C. Bookey Supply had been engaged in, in the same place, with the same equipment and with the same trucks (Tr. 327-328). He further admitted that J. C. Bookey, Jr., was working for the business at that time (Tr. 328). In view of his testimony that he was one of the operators of Chicken-Eggs until July when he pulled out and transferred the automobiles and trucks to it (Tr. 330) and Mr. Plumer's testimony that he understood the property was given to Arnold in settlement of a wage claim

while at the same time Plumer had been an employee of J. C. Bookey Supply and was claiming to run Chicken-Eggs, Inc. (Tr. 293-300), it is clear that Plumer and Chicken-Eggs, Inc., had full knowledge of the fact that no consideration was given J. C. Bookey Supply by Charles Arnold for the transfer of the automobiles.

Charles Arnold then testified he sold this property to Chicken-Eggs, Inc., in July for \$642.00 and Chicken-Eggs, Inc., assumed the bills which were incurred while the trucks were operating for Chicken-Eggs, Inc. It is of interest to note that he was paid nothing for the use of these trucks supposedly owned by him while Chicken-Eggs was operating them, and apparently he had nothing to say about the use of them. It is also interesting to note that the alleged payment was in cash, and allegedly all spent in cash without going through a checking account or any form which could be traced (Tr. 327-331).

The first testimony Mr. Plumer gave in regard to the transfer of these trucks and automobiles was very confusing and leaves considerable inference that there was a prearranged plan for Mr. Arnold to take the trucks and then use them in the operations of Chicken-Eggs along with Plumer and Bookey, Jr. (Tr. 167-169). He later testified that the trucks had been used by Chicken-Eggs, Inc., in its business since March 31, 1954; that Mr. Arnold was paid nothing for their use during that time; that when the trucks were acquired by Chicken-Eggs, Inc., from Arnold, he was charged with all of the costs of repairs and maintenance, operation, gas and oil, thus reducing the net amount it would pay him for the trucks to the alleged sum of \$642.00 (Tr. 295-298). Again, it is in-

teresting to note that this payment was cash from a safe, and completely untraceable; that the operation of the trucks by Chicken-Eggs, Inc., from the time there was a purported transfer of them from J. C. Bookey Supply to Charles Arnold is completely inconsistent with any valid transfer of possession and ownership at any time; that Chicken-Eggs, Inc., made no investigation to determine whether there were any liens or encumbrances on the trucks at the time it allegedly purchased them from Arnold (Tr. 299).

2. Conclusion.

With regard to the first transfer from J. C. Bookey Supply to Charles Arnold, the only conclusion that can be drawn from the above evidence is that there was no obligation whatsoever from J. C. Bookey Supply to Charles Arnold; that this was known to both J. C. Bookey, Jr., and Charles Arnold, and that there was no consideration for the transfer of the automobiles to Charles Arnold. The only conclusion which can next follow from this testimony is that Chicken-Eggs, Inc., gave no consideration to Charles Arnold for the transfer of the automobiles and trucks; that it knew there was no consideration given by Charles Arnold for the transfer from J. C. Bookey Supply; and that in fact the trucks and automobiles were never actually transferred except for the transfer of a naked, legal title.

Thus, both Charles Arnold and Chicken-Eggs, Inc., took naked title to the automobiles, giving no consideration for them and having no claim on them with any merit or substance to it; and the transfers were mere shams and pretenses to conceal the assets from the

creditors and trustee of J. C. Bookey Supply. Consequently, the referee in Bankruptcy was correct in exercising summary jurisdiction and ordering this property turned over to the trustee in bankruptcy.

D. Appellant, Chicken-Eggs, Inc., was organized for the purpose of hiding and concealing the assets of J. C. Bookey Supply, and is a continuing operation of J. C. Bookey Supply with no change in actual ownership and control; and all property including that referred to above as Class A, B and C held by it actually is the property of J. C. Bookey Supply and belongs to the trustee in bankruptcy.

1. Facts pertaining to transfer of Class A, B and C property from J. C. Bookey Supply to Chicken-Eggs, Inc., and continuing operation of J. C. Bookey Supply under guise of Chicken-Eggs, Inc.

The findings of fact made by the referee which pertain to the transfer of the general assets of J. C. Bookey Supply to Chicken-Eggs, Inc., and to the continuing operation of J. C. Bookey Supply under the guise of Chicken-Eggs, Inc., are Numbers X, XI, XIV and XV (Tr. 23, 24, 26). The evidence in support of these findings is scattered throughout the entire hearing, and to get a full understanding of the basis for the said findings of fact, it is necessary to take the cumulative effect of the entire testimony of the appellants and James C. Bookey, Jr. Such a review of the entire testimony leaves no question as to the correctness of the said findings.

The substance of these findings is that Samuel Plumer, Charles Arnold and James C. Bookey, Jr.,

were in possession of and using all the assets of J. C. Bookey Supply from on or about April 1, 1954, until the date of the hearing; that the name used by these men was Chicken-Eggs, Inc., which was non-existent as a corporation and in fact an organization created by James C. Bookey, Jr., and Samuel Plumer for the purpose of hiding and concealing assets of J. C. Bookey Supply from its creditors and its trustee in bankruptcy; that Samuel Plumer continued to be employed by the organization, Charles Arnold continued to be a truck driver for it, and James C. Bookey, Jr., continued to be the manager of it; that the organization was in fact a continuing operation of J. C. Bookey Supply with no change in actual ownership and control; that at all times the property theretofore owned by J. C. Bookey Supply was in the possession and control of the organization and being managed and operated by James C. Bookey, Jr., and Samuel Plumer; that the accounts receivable and moneys due J. C. Bookey Supply were turned over to the fictitious organization, Chicken-Eggs, Inc., and no consideration was given J. C. Bookey Supply for the said accounts receivable and moneys.

The testimony of Plumer, Arnold and Bookey throughout is to the effect that Chicken-Eggs, Inc., commenced business on April 1, 1954. The specific testimony of Mr. Arnold with regard to the operations of this organization showed Bookey and Plumer continued to operate it and Arnold continued to be a truck driver, taking orders and doing as he was told by the other two

men. The testimony of Mr. Arnold was in substance as follows:

Tr. 327-328: That the business of Chicken-Eggs, Inc., was the same type, done in the same place, with the same equipment as had been used by J. C. Bookey Supply; that James C. Bookey, Jr., was working for Chicken-Eggs, Inc.

Tr. 331-332: That he was the managing officer of Chicken-Eggs, Inc., but had nothing to do with handling the finances; that he endorsed some checks payable to J. C. Bookey Supply, and endorsed the checks which Mr. Plumer would "have me endorse."

Tr. 327: That the trucks allegedly transferred by J. C. Bookey Supply were used in the business.

Tr. 335: That the possession of the trucks was taken by him and Chicken-Eggs, Inc., at 17000 Aurora, the place of business of J. C. Bookey Supply, and that any which were removed from there were returned "when Mr. Plumer wanted them."

The following testimony of James C. Bookey, Jr., bears directly to his relationship to Chicken-Eggs, Inc., and its operations:

Tr. 204: That he was working for Chicken-Eggs, Inc., in "the managerial position at the moment."

Tr. 228-231: While being very evasive, finally through lengthy examination, he admitted the business of Chicken-Eggs, Inc., was being carried on in the same place, same manner and same type of business as J. C. Bookey Supply was, the specific testimony while being questioned by Mr. Madison being as follows:

“Q. Now, the business of Chicken-Eggs was carried on in the same place where you were operating the business of J. C. Bookey Supply?

A. I didn't get the first part of your question, sir.

Q. The business of Chicken-Eggs, Inc., is carried on in the same place where you were operating J. C. Bookey Supply, is that right?

A. The main part of it there, I guess you would say, yes.

Q. Well, it is the same building, the same place?

A. Well, that is where they do their work, yes.

Q. And it is engaged in buying and selling eggs, is it not?

A. Well, not extensively buying and selling. They buy, like I say, and they put some in cans, frozen, and they repack them and they take their bloody ones out from the good ones and they put the B's in one place and the C's in another place.

Q. They sell them?

A. Yes, they have to sell them.

Q. And they buy and sell feed?

A. No.

Q. Do they do anything else besides this operation with eggs?

A. Not that I know of. If they do it isn't under my jurisdiction.

Q. Well, now, I ask you if this Chicken-Eggs, Inc., is merely in business operating for you under the same business that J. C. Bookey Supply had?

A. For me?

MR. DUNNING: Just a moment, does he understand the question?

Q. (By MR. MADISON) People are dealing with you as the owner of Chicken-Eggs and as they dealt with J. C. Bookey Supply?

A. No, not that.

Q. For instance, I have here a duplicate freight bill from United Truck Lines for 15 dozen cases of medium eggs and 30 dozen cases medium eggs, double A medium eggs, September 17, 1954, from a shipper in Oregon to "Bookeys." Did you order those?

A. I can't tell unless I see the bill of lading. I don't know what you are talking about.

MR. MADISON: May I have that marked as an Exhibit?

Q. (By MR. MADISON) The business of Chicken-Eggs, Inc., is that the same as that of J. C. Bookey Supply?

A. No, it isn't.

Q. How does it differ?

A. Buying from different people, selling to different people.

Q. The type of business is the same?

A. Well, it is egg business, I guess, that would be it. They are not dealing in other goods.

Q. And is operating in the same place and you are managing it now for them, is that right?

A. I am working in the management department, yes."

The testimony of Plumer bearing specifically on the relationship of J. C. Bookey, Jr., to Chicken-Eggs, Inc., and its operations is as follows:

Tr. 159: That Chicken Eggs, Inc., got the office fixtures and equipment and plant fixtures and equipment of J. C. Bookey Supply.

Tr. 165: That Chicken-Eggs, Inc., got substantially all of the office fixtures and the plant equipment J. C. Bookey Supply was using, "the same stuff."

Tr. 168-169: That in acquiring the trucks, "we made the deal with Mr. Arnold. That is, on the trucks." (who the witness meant by "we" is not known unless it was J. C. Bookey, Jr.); that Mr. Bookey turned the trucks over to Arnold during April and, "Mr. Arnold was going to use the trucks to operate, — to help us operate Chicken-Eggs." (Again, who was meant by "us" is unknown unless it was J. C. Bookey, Jr.); the trucks were used in the business and that they had agreed to so use them.

Tr. 254: That he is the office manager and secretary of Chicken-Eggs, Inc.

Tr. 263-264: That Chicken-Eggs, Inc., has been operating the same type of business in the same plant with the same office and plant fixtures and equipment as J. C. Bookey Supply had formerly been operating.

Tr. 296-297: That the trucks were used by Chicken-Eggs, Inc., from April 1 on; Mr. Arnold

was paid nothing for their use, and was charged personally with the cost of repairing, maintenance and operation of the trucks, and the gas and oil.

Tr. 299: That no investigation was made to determine whether there were any liens or encumbrances on the trucks when they were allegedly purchased from Mr. Arnold.

Tr. 301-302: That the inventory, second-hand cases, fillers, dividers and cartons of J. C. Bookey Supply were taken by Chicken-Eggs, Inc.

Tr. 303-307: Some testimony as to the taking of an inventory to determine the price of the supplies allegedly purchased but very conflicting, and no evidence introduced to show a memorandum or inventory; that no investigation was made as to whether there were any liens or encumbrances on the supplies, or on the plant equipment and fixtures.

Tr. 314-318: That Chicken-Eggs, Inc., took over the business on April 1 and J. C. Bookey, Jr., was employed by it; that he took over everything that was at the place of business of J. C. Bookey Supply as of April 1, 1954, including the trucks and cars which were claimed by Mr. Arnold; that the checks to J. C. Bookey Supply came to Mr. Bookey and were brought to the office by him; that checks for accounts receivable due J. C. Bookey Supply were deposited in the bank account of Chicken-Eggs, Inc. (claiming to have paid cash for them on behalf of Chicken-Eggs, Inc.). that no bill of sale, conveyance or any paper whatsoever was put of record in the auditor's office or in any other office to show a transfer of the assets or business; that no letters

were written to anyone telling them there had been a change in ownership.

The testimony of James C. Bookey, Jr., bearing on the transfer of accounts receivable from J. C. Bookey Supply to Chicken-Eggs, Inc., and the question of what consideration was given therefor, is in substance as follows:

Tr. 235-237: That Chicken-Eggs, Inc., cashed checks for him in explanation of the numerous checks payable to J. C. Bookey Supply which were endorsed over to Chicken-Eggs, Inc.. that for every check endorsed over to Chicken-Eggs, Inc., he was given the cash for the full face value of the check; that the cash was given him by Mr. Plumer at the place of business; that he picked up checks with a part of the cash and spent part of it; that he had no accounting to show the disposition of the funds and no written records to show this.

The testimony of Mr. Plumer regarding the transfer of accounts receivable and checks from J. C. Bookey Supply to Chicken-Eggs, Inc., and the consideration paid therefor, was in substance as follows:

Tr. 265-271: That Chicken-Eggs, Inc., took over no accounts receivable of J. C. Bookey Supply but cashed checks for Mr. Bookey, giving him cash for each J. C. Bookey Supply check endorsed to Chicken-Eggs, Inc. When questioned as to where the cash came from, Mr. Plumer was very evasive and only through lengthy examination was the following elicited: that the cash was money he had saved over a period of years which he had kept in his home for quite a while and then in the safe of a

friend who was to put it in a safe deposit box; that the bulk of the money was given to this friend, George Turner, about the first of the year; that it was in envelopes which were sealed, in the total sum of approximately \$38,000; that the friend did not know what was in the envelopes, and they merely had Mr. Plumer's name (without address) on them; that he thought the friend was keeping them in his safe deposit box; and that there were about twenty envelopes with approximately \$2,000 in each envelope.

Tr. 282-293: Again, Mr. Plumer was very evasive and only with great difficulty was the following evidence elicited: that cash was given J. C. Bookey, Jr., for each of the checks endorsed by J. C. Bookey Supply to Chicken-Eggs, Inc.; that the cash was obtained from a safe in the place of business of George Turner; that the cash was deposited in this safe about the first of 1954, in the total amount of nearly \$40,000; that there were 20 or 25 envelopes of cash; that the denominations of all of the bills were tens and twenties or less; that Mr. Plumer made 30 to 40 trips into and out of the friend's tavern to deposit or obtain money from the safe during the first part of 1954; that there was a safe at the place of business of J. C. Bookey Supply and/or Chicken-Eggs, Inc.; that he didn't believe the friend made any trips to a safe deposit box, and the friend didn't get any money out of the safe deposit box when Mr. Plumer went to get the money (despite his previous testimony it was kept in the friend's safe deposit box); that prior to the time the cash was deposited with Mr. Turner, Mr. Plumer kept it concealed in his home in a tin box; that he had accumulated this cash since 1939 and

1940; that he had never kept it in a safe or safe deposit box or deposited it in a bank in any kind of an account; that it has been at the place he has lived in Edmonds from 1939 until the first of 1954; that he left it there in his wife's possession when he was out of this country in Greenland and Alaska; that his wife had been continuously at that address since January of 1954 but that he moved the funds from the tin box where they had remained for 15 years to the safe in Mr. Turner's place of business because, "If my wife wasn't home, she had the key to the box."

Tr. 118-122: That he had previously testified he had the money in a safe deposit box at Edmonds but later went and asked Mr. Turner about it and found that the safe deposit box was in the Greenwood Branch of the Seattle-First National Bank; that it was his understanding when he went to Mr. Turner for an envelope of cash, Mr. Turner would go to the safe deposit box and get it but he wasn't sure which bank it was in; that Mr. Plumer never had a safe deposit box of his own; that Mr. Turner accepted the envelopes and said he would put them in a safe deposit box but did not give any receipt for them to Mr. Plumer; that when he had previously testified he got the cash from his own safe deposit box in the bank in Edmonds, he was mistaken and under the impression that Turner had kept the money in a safe deposit box at Edmonds National Bank of Commerce; that he had no record of the money, and there is no way to trace it.

2. Conclusion.

The total effect of the foregoing testimony leads to no conclusion except that as reflected in the findings of

fact. It shows, without a doubt, that Chicken-Eggs, Inc., is a sham organization created for the purpose of concealing the proper assets of J. C. Bookey Supply from its creditors. It further shows no consideration was given J. C. Bookey Supply by the appellants and that the appellants were close relatives and friends of James C. Bookey, Jr., acting in concert to assist him in hiding and concealing the property involved. It further shows the property was at all times and now is, in substance, the property of J. C. Bookey Supply. These conclusions were very excellently summarized by the referee in his memorandum decision (Tr. 17g-17k). The findings of fact referred to above automatically follow, and the conclusions of law and order directing turnover of property designated as Class C, and also including Class A and Class B were proper. The referee in bankruptcy was correct in exercising summary jurisdiction and directing the turnover of this property.

E. The appellants received a fair trial and the referee in bankruptcy was not prejudiced prior to and during the trial.

Contrary to the contention of appellants, the referee in bankruptcy was not prejudiced in the trial of these matters. The charges levied by the appellants of bias and prejudice are serious ones, and the record just does not substantiate them in any degree whatsoever. The trial was handled by the referee in a fair and impartial manner. His memorandum decision, findings of fact, conclusions of law and order directing turnover of property to trustee were based on his considered judgment of all of the evidence introduced, and were amply

supported by the testimony of the appellants and James C. Bookey, Jr.

The appellants and James C. Bookey, Jr., testified to conflicting and unbelievable stories, made inconsistent statements, and changed their testimony from time to time, and they are now taking the very untenable position of complaining of the referee's attempts to elicit the true facts.

The hearings initially involved four petitions for turnover orders, and testimony was taken with regard to all four. One of the petitions involved personal property located in the home of the bankrupt, James C. Bookey, Sr., which appellant, Samuel H. Plumer, had previously admitted having in his possession. At these hearings, he denied having the property, and the referee gave him and the other appellants every opportunity to locate this property, knowing the serious consequences they might face if the property were being concealed by them.

At the hearing on September 9, 1954, Mr. Plumer admitted the personal property had been in the house and that he had agreed to turn it over to the trustee (Tr. 146-148). He then said it was gone and he didn't know where it was, although he had permitted no one to take it, no one had broken into the house, and he had not reported it as stolen (Tr. 148-151; 259-262). The referee was disturbed by the missing property, but certainly he was not biased or prejudiced thereby. He continued the hearing on this particular turnover order and on the others to September 30, 1954, to permit fur-

ther investigation (Tr. 182-183). At the continued hearing, the first matter taken up was the petition for the turnover of this property. No further evidence was available and the referee gave all present an opportunity to volunteer any information on this property if they had any (Tr. 195-198). Further examination was had on this turnover order (Tr. 259-262) in which Mr. Plumer then indicated the house may have been broken in to. The referee then denied the turnover order since the property could not be located. There is no indication that this in any way prejudiced the referee or affected the trial on the other petitions, and the claim of appellants that it did is absolutely ridiculous.

The appellants claim that during the examination of James C. Bookey, Jr., the referee admitted he was biased and prejudiced. They point to his statement that he had "practically" made up his mind (Tr. 205). When this statement is viewed in the proper perspective, the claim of prejudice by the appellants becomes ridiculous, and their statement that the referee admitted he was biased and prejudiced is completely erroneous and unfounded. An extended hearing on the petition had taken place on September 9, 1954, at which time substantial argument was heard regarding the application of the Bulk Sales Act. The referee was of the opinion it applied, but he offered to hear from appellants on this point, and adjourned from 12:00 o'clock to 2:30 o'clock for this purpose (Tr. 169-171). The appellants argued orally on the application of the Bulk Sales Act but did not present any written brief, although they had had two weeks to answer the petition

(Tr. 172-179). The referee announced that on the record as it then stood, he would hold the Bulk Sales Act applicable, but he continued the hearing to September 30, 1954, to get all the evidence in one record, thus giving appellants time to present a brief on the application of the Bulk Sales Act (Tr. 179-180).

At the commencement of the hearing on September 30, 1954, appellants argued further on the application of the Bulk Sales Act (Tr. 189-193). When the examination commenced, the appellants objected to going into matters investigated at the hearing on September 9 and asked if the referee had made up his mind. His answer reflected his views based on the evidence taken September 9, and at this stage he correctly felt the Bulk Sales Act was applicable and the position of the trustee well taken unless a substantial defense was shown by the appellants. He in no way foreclosed them from proceeding to show such a defense and said (Tr. 205):

“I wouldn’t be here trying this case if you had shown any substantial defense because then I wouldn’t have jurisdiction, but you haven’t shown any substantial defense yet so we will put on the evidence and then hear your argument and your brief if you have a brief here. Proceed.”

There was no indication, admission or suggestion of bias or prejudice on the part of the referee. Appellants were given all the opportunity they wished to present evidence, arguments and briefs to show a substantial defense. Since they failed to show such a defense, the referee properly directed the property to be turned over to the trustee.

The appellants have further claimed in pages 17-20 of their brief that the referee displayed his bias and prejudice in the examination of Samuel H. Plumer (Tr. 315-319). A reading of this testimony, which appellants have quoted in their brief, in no way indicates any prejudice or bias on the part of the referee. The referee was questioning the witness to determine what steps were taken, what public record was made, and what documents may have been filed to indicate a change in ownership and operation of J. C. Bookey Supply to Chicken-Eggs, Inc. Although the questions asked by the referee seemed to be perfectly clear in their meanings, the attorneys for the appellants appeared very confused by them and could not seem to understand the simple questions. They discussed the questions with the referee, and in response to each one objected to by them, the referee rephrased the question in a form satisfactory to them (Tr. 318-319). The attempt of appellants to infer bias and prejudice from this examination is so absurd and ridiculous as to be wholly without substance or merit.

In view of the fact that the record is so clear that there was no prejudice or bias on the part of the referee; that the appellants at no time filed an affidavit of prejudice, indicated to the referee they felt he could not impartially try the case, or requested that the referee disqualify himself, it seems inconceivable that the appellants can now take the position the referee was biased and prejudiced in connection with the trial of these matters. It is respectfully submitted that the referee was not biased or prejudiced, and that the District Court

did not err in not finding that the appellants did not receive a fair trial.

F. CONCLUSION

The conclusions of law and order directing turnover of property to trustee are not only correct, but are mandatory if the findings of fact are correct.

The alleged transfer of the property described as Class A from J. C. Bookey Supply to Chicken-Eggs, Inc., was in direct violation of the Bulk Sales Act of the State of Washington, and was fraudulent and void as against the trustee in bankruptcy.

The alleged transfer of the property described as Class B from J. C. Bookey Supply to Charles Arnold, and ultimately to Chicken-Eggs, Inc., was for no consideration whatsoever, and at most, the appellants held bare, naked title to this property, with no claim of substance or merit to it.

All of the property which was the subject matter of the turnover order was the property of the bankrupt, J. C. Bookey Supply, came from the said bankrupt, never was transferred from it by any transaction more than the transfer of paper title to Chicken-Eggs, Inc., for the purpose of concealing the property and defrauding creditors, and it at all times was and still is the property of the said bankrupt.

Under the findings of fact, the appellants had no valid or substantial claim whatsoever to any of the property, and the trustee in bankruptcy of J. C. Bookey Supply is entitled to it as decreed in the order.

The findings of fact are amply supported by the evidence, and in fact, are compelled by a complete analysis of the evidence. When consideration is given all of the circumstances and testimony, including the following:

- (1) Close relationship and subordination of appellants to the bankrupt;
- (2) Only testimony and evidence available on the issues involved was from highly adverse and interested parties;
- (3) No notice was given to the public by filing papers in public records, publishing in newspapers, writing creditors or customers, or otherwise of the alleged transfer of the property and business of J. C. Bookey Supply;
- (4) All transfers of property and alleged purchases were done in a manner completely contrary to normal business practices and in a manner deliberately calculated to make it impossible to trace the alleged purchases and prove by independent evidence the falseness and invalidity of them;
- (5) The testimony given by the appellants being so conflicting, vague and indefinite, and in several instances, incredible and almost impossible;
- (6) The failure of appellants to produce any third party or any instruments, checks, records or documents to substantiate or verify the conflicting, incredible and unbelievable statements made by them;
- (7) The changing and ridiculous explanation by Mr. Plumer concerning the source of and handling of his cash giving rise to the cash transaction;

(8) The complete testimony of the appellants; it is impossible to reach any findings of fact other than those which were reached by the referee.

It is respectfully submitted by appellee that the order of the District Court affirming the order of the referee directing the property be turned over to the trustees be affirmed and that appellee have judgment against appellants for his costs and disbursements to be taxed on appeal.

Respectfully submitted,

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No. 14947

United States
Court of Appeals
for the Ninth Circuit

JOHN FOSTER DULLES, as Secretary of State,
Appellant,
vs.
TAM SUEY JIN, Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

FEB 23 1956

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Southern District of California, Central Division

No. 14894-C

TAM SUEY JIN,

Plaintiff,

vs.

DEAN ACHESON, as United States Secretary of
State, Defendant.

PETITION TO ESTABLISH NATIONALITY
OF THE UNITED STATES PURSUANT
TO SECTION 903, TITLE 8, U.S.C.A.

Comes now the plaintiff above named, by and
through her guardian ad litem, Tam Tong Gong,
and for cause of action alleges as follows:

I.

That the plaintiff was born on April 28, 1941
(CR 30-4-3) in Chen Wah Village, Toi-Shan,
China.

II.

That plaintiff is the daughter of Tam Tong Gong,
a citizen of the United States, now residing in Los
Angeles, California; that said Tam Tong Gong was
married to Lee Shee in Lung Hong Village, Toi-
Shan, China, on or about April 21, 1920 (CR
9-3-3); that plaintiff is the lawful issue of said
marriage; that Tam Tong Gong was a citizen of
the United States at the time of plaintiff's birth
and has lived and resided in the United States since

May 17, 1923, and was admitted to the United States by the United States Immigration and Naturalization Service as a citizen of the United States; that plaintiff's father, **Tam Tong Gong** resides in the City of Los Angeles, County of Los Angeles, State of California; that plaintiff claims residence in said City of Los Angeles, State of California, the home of plaintiff's father and in the jurisdiction of this Court; that because of her birth as above alleged, plaintiff claims to be a citizen of the United States pursuant to Section 1993, Revised Statutes of the United States, and entitled to the rights and privileges of a citizen of the United States, including the right to enter and remain in the United States as a citizen thereof.

III.

That plaintiff heretofore filed an application for an American passport or other travel document as a citizen of the United States with the American Consulate General at Hong Kong, China, an agency of the United States State Department, and under the jurisdiction, management and direction of defendant, Dean Acheson, Secretary of State of the United States, for the purpose of traveling to the United States to join her father, **Tam Tong Gong**, at the family home provided by her said father in Los Angeles, California; that the American Consulate General at Hong Kong has refused to issue to plaintiff the passport applied for, thereby denying plaintiff's American citizenship and her rights and privileges as a citizen of the United States.

IV.

That plaintiff has at all times herein mentioned claimed and now claims the right and privilege as a national of the United States of America to enter, stay and remain and reside permanently in the United States as a citizen thereof, but that the said defendant has denied and continues to deny such rights and privileges to the plaintiff upon the ground that she is not a national of the United States.

V.

That plaintiff having been denied her rights as hereinabove alleged, now brings this action in good faith pursuant to the provisions of Section 903, Title 8, U.S.C.A., also known as Section 503 of the Nationality Act of 1940.

Wherefore, plaintiff respectfully prays that judgment of this Honorable Court be entered declaring her to be a national of the United States and entitled to the rights and privileges of a citizen of the United States, and for such other and further relief as to the Court may seem just and proper.

/s/ TAM TONG GONG,

Guardian for Plaintiff, Tam
Suey Jin, a Minor

[Endorsed]: Filed December 22, 1952.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant, Dean Acheson, as United States Secretary of State, by and through his attorneys, Walter S. Binns, United States Attorney for the Southern District of California, Clyde C. Downing and Leila F. Bulgrin, Assistants United States Attorney for the Southern District of California, and in answer to plaintiff's petition on file herein, admits, denies and alleges as follows:

I.

Answering Paragraph I, the defendant alleges he is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in said Paragraph, and therefore denies generally and specifically every part thereof.

II.

Answering Paragraph II, the defendant denies that Tam Tong Gong was at any time a citizen of the United States, or that he was admitted to the United States at any time as a citizen by the United States Immigration and Naturalization Service.

Further answering Paragraph II, the defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth or falsity of all other allegations contained in said Paragraph, and therefore denies generally and specifically the same and every part thereof.

III.

Answering Paragraphs III, IV and V, the defendant denies generally and specifically each and every allegation contained therein.

Further answering said Paragraphs, defendant denies that the plaintiff is, or ever has been, a citizen of the United States, or entitled to any rights or privileges as such.

For a Further, Second and Separate Defense to Plaintiff's Petition, Defendant Alleges:

I.

The petition of plaintiff herein fails to state a claim upon which relief can be granted.

Wherefore, defendant prays for a judgment dismissing said petition and denying the relief prayed for therein.

WALTER S. BINNS,
United States Attorney

CLYDE C. DOWNING,
Assistant U. S. Attorney, Chief
of Civil Division

/s/ LEILA F. BULGRIN,
Assistant U. S. Attorney,

Attorneys for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 8, 1953.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS; MOTION
TO DISMISS; AND AFFIDAVIT OF
JAMES R. DOOLEY

Notice of Motion to Dismiss

To the Plaintiff above named and to Kathleen
Parker, his Attorney:

You and Each of You Will Please Take Notice
that the defendant above-named, by and through
the undersigned, will bring the following Motion
to Dismiss under Rule 12(b) (1) (6) and 12 (h),
Federal Rules of Civil Procedure, on for hearing
before the above entitled Court in the Courtroom
of the Hon. Harry C. Westover, United States
District Judge, in the United States Post Office
and Court House Bldg., 312 North Spring Street,
Los Angeles, California, on Monday the 13th day
of June, 1955, at 10:00 o'clock in the forenoon of
that day, or as soon before or as soon thereafter as
counsel can be heard.

Dated: This 1st day of June, 1955.

LAUGHLIN E. WATERS,
United States Attorney

MAX F. DEUTZ,
Assistant U. S. Attorney, Chief
of Civil Division

/s/ JAMES R. DOOLEY,
Assistant U. S. Attorney,
Attorneys for Defendant

Motion to Dismiss

Defendant above named, by and through the undersigned, moves the Court to dismiss the within action pursuant to Rule 12(b) (1) (6) and Rule 12 (h), Federal Rules of Civil Procedure, on the following grounds:

1. This Court lacks jurisdiction over the subject matter of the instant action.

2. The Complaint on file herein fails to state a claim upon which relief can be granted.

This Motion is based upon, and will be presented upon, the affidavit of James R. Dooley, attached hereto as Exhibit A, the certified passport file of Tam Suey Jin, which will be offered in evidence when this Motion comes on for hearing, a certified statement prepared by the Department of State concerning the processing of applications in Hong Kong, B.C.C., which will be offered in evidence when this Motion comes on for hearing, these Motion papers and Memorandum of Points and Authorities in Support thereof, together with all the records, files, pleadings, papers and documents on file herein.

Dated: This 1st day of June, 1955.

LAUGHLIN E. WATERS,

United States Attorney

MAX F. DEUTZ,

Assistant U. S. Attorney, Chief
of Civil Division

/s/ JAMES R. DOOLEY,

Assistant U. S. Attorney,

Attorneys for Defendant

EXHIBIT A

Affidavit of James R. Dooley

United States of America,
Southern District of California—ss.

James R. Dooley, being first duly sworn, deposes and says:

1. That he is an Assistant United States Attorney in the office of Laughlin E. Waters, United States Attorney for the Southern District of California, and as such is in charge of the files in said office pertaining to the above-captioned matter.

2. That among the aforementioned files of which affiant is in charge are certain documents, duly certified under seal of the Department of State constituting the passport file in the case of Tam Suey Jin, plaintiff herein.

3. That said passport file in the case of Tam Suey Jin discloses the following:

(a) That on May 6, 1952, plaintiff executed an application for passport before Frank J. Haughey, Vice Consul of the United States at Hong Kong, B.C.C. in which she claimed to be a citizen of the United States, and in which she sought a passport to travel to the United States.

(b) That on July 13, 1954, Imogene E. Ellis, American Vice Consul at Hong Kong, B.C.C. recommended that the Department of State disapprove plaintiff's application for passport, and that on July 15, 1954, said recommendation was concurred in by Gilda R. Duly, American Vice Consul.

(c) That by Cable No. A-184, dated September 23, 1954, the Passport Office, Department of State, instructed the American Consulate General, Hong Kong, B.C.C. that the passport application of plaintiff was disapproved.

(d) That said passport file does not show a disapproval of plaintiff's application for passport prior to September 23, 1954.

/s/ JAMES R. DOOLEY

Subscribed and Sworn to before me this 2nd day of June, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk, U. S. District Court, Southern District of California.

/s/ By [Illegible], Deputy

[Endorsed]: Filed June 2, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Tam Hem Fook vs. Dulles, Sec'y of State, No. 14,293-HW-Civil; Tam Suey Jin vs. Dulles, Sec'y of State, No. 14,894-HW-Civil; Tam Hem Wing vs. Dulles, Sec'y of State, No. 14,895-HW-Civil. (Consolidated for Trial.)

Date: June 2, 1955, at Los Angeles, Calif.

Present: Hon. Harry C. Westover, District Judge; Deputy Clerk: Mary O. Smith; Reporter:

S. J. Trainor; Counsel for Plaintiff: Kathleen Parker; Counsel for Defendant: James R. Dooley, Ass't U. S. Att'y.

Proceedings: For trial. It is Ordered that these three causes be Consolidated for trial.

Lily L. Chan is sworn and acts as Chinese Interpreter, and is called, sworn, and testifies on examination by counsel for defendant.

Tam Tong Gong is called, sworn, and testifies for plaintiffs through said interpreter.

Plfs' Ex. 1, 2, 3, and 4 are admitted in evidence. It Is Ordered that Ex. 1 and 2 may be returned to defendant at conclusion of the case.

Counsel enter into certain stipulation.

Plfs' Ex. 5 is admitted in evidence.

Plfs' Ex. 2-A and 2-B are admitted in evidence, being part of Ex. 1.

Pltfs' Ex. 6, 7, and 8 are admitted in evidence.

At 10:55 a.m. court recesses. At 11:05 a.m. court reconvenes herein, and all being present as before.

Hom Cheung is called, sworn, and testifies for plaintiff through said interpreter. Tom Bing Hong is called, sworn, and testifies for plaintiffs.

At noon court recesses. At 2 p.m. court reconvenes herein, and all being present as before, including counsel for both sides;

Toi Lun Tom is called, sworn, and testifies for plaintiffs through said interpreter. Plfs' Ex. 9 is admitted in evidence, and it is ordered that said exhibit may be withdrawn by defendant at conclusion of trial.

Hom Cheung, plaintiffs' witness, heretofore

sworn, is recalled on examination and testifies through said interpreter.

Deft's Ex. A and B are admitted in evidence.

At 3:05 p.m. court recesses. At 3:15 p.m. court reconvenes herein, and all being present as before, including counsel for both sides;

Counsel on behalf of defendant presents in Case No. 14,894-HW motion to dismiss. Court Orders said motion filed, and Further Orders said motion to dismiss Denied.

Deft's Ex. C is admitted in evidence as to Case No. 14,894-HW Civil.

Tam Tong Gong, plaintiff's witness, is recalled on examination by def't.

Both sides rest.

Court makes a statement and Finds in favor of plaintiffs and against defendant; counsel for plaintiffs to prepare findings of fact, conclusions of law and judgment accordingly.

JOHN A. CHILDRESS,
Clerk

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly to be heard in the above entitled Court on June 2, 1955, before the Honorable Harry C. Westover, Judge Presiding, Kathleen Parker appearing as attorney

for the plaintiff, Tam Suey Jin, and Laughlin E. Waters, United States Attorney, and Max F. Deutz, Assistant United States Attorney, by James R. Dooley, Assistant United States Attorney, appearing as attorneys for defendant John Foster Dulles, Secretary of State of the United States of America; and evidence, both oral and documentary, having been introduced and the cause having been argued and submitted for decision, the Court now makes its findings of fact and conclusions of law as follows:

Findings of Fact

I.

That plaintiff, Tam Suey Jin, was born on April 28, 1941 (CR 30-4-3) in Chew Wah Village, Toi-Shan, China.

II.

That plaintiff's father is Tam Tong Gong; that said Tam Tong Gong is a citizen of the United States; that plaintiff's mother is Lee Shee, now deceased; that plaintiff's father, Tam Tong Gong, married said Lee Shee in Lung Hong Village, Toi-Shan, China, on April 21, 1920 (CR 9-3-3); that plaintiff is the lawful issue of said marriage; that plaintiff's father, Tam Tong Gong, was a citizen of the United States at the time of the birth of plaintiff, Tam Suey Jin, and that said Tam Tong Gong lived and resided in the United States from a time prior to the date of plaintiff's birth; that plaintiff's place of residence is Los Angeles, County of Los Angeles, State of California.

III.

That defendant John Foster Dulles is the duly qualified Secretary of State of the United States of America and is executive head of the United States Department of State and of the United States Consular Service.

IV.

That plaintiff, Tam Suey Jin, has at all times herein mentioned claimed to be a citizen and national of the United States of America, and claimed the right to enter, stay, remain and reside permanently in the United States as a national and citizen thereof; that on May 6, 1952, plaintiff, Tam Suey Jin, executed and filed with the American Consul at Hong Kong, B.C.C., China, an application for an American passport; that prior to the date of the filing of the complaint herein no action had been taken by the American Consul on said application; that the delay in acting thereon was unreasonable and the failure to act on said passport application within a reasonable time was a denial of plaintiff's rights and privileges as a national and citizen of the United States by defendant through his agents and subordinates.

Conclusions of Law

Upon the foregoing findings of fact, the Court concludes:

I.

That Tam Suey Jin is, and since her birth on

April 28, 1941 (CR 30-4-3) has been, a national and citizen of the United States of America.

The clerk is ordered to enter judgment.

Dated: June 24, 1955.

/s/ HARRY C. WESTOVER,
United States District Judge

Acknowledgment of Service attached.

[Endorsed]: Filed June 24, 1955.

In the United States District Court, Southern District of California, Central Division

No. 14894-HW

TAM SUEY JIN,

Plaintiff,

vs.

JOHN FOSTER DULLES, as Secretary of State,
Defendant.

JUDGMENT DETERMINING AMERICAN
CITIZENSHIP

The above entitled matter having come on for trial on June 2, 1955, before the Honorable Harry C. Westover, Judge Presiding, Kathleen Parker appearing as attorney for plaintiff, and Laughlin E. Waters, United States Attorney, and Max F. Deutz, Assistant United States Attorney, by James R. Dooley, Assistant United States Attorney, appearing as attorneys for defendant, the said defendant having filed an answer to the complaint, and

the Court having heard the testimony of the witnesses and considered the evidence, both oral and documentary, together with arguments of counsel for the respective parties, and being fully advised in the premises and having made its findings of fact and conclusions of law,

It Is Hereby Ordered and Adjudged that Tam Suey Jin, the plaintiff herein, is a national and citizen of the United States of America.

Dated: June 24, 1955.

/s/ HARRY C. WESTOVER,
United States District Judge

Acknowledgment of Service attached.

[Endorsed]: Filed and Entered June 24, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that John Foster Dulles, as Secretary of State, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 24, 1955.

Dated: This 22 day of August, 1955.

LAUGHLIN E. WATERS,
United States Attorney
MAX F. DEUTZ,
Assistant U. S. Attorney, Chief
Civil Division

JAMES R. DOOLEY,
Assistant U. S. Attorney
/s/ JAMES R. DOOLEY,
Assistant U. S. Attorney,
Attorneys for Defendant

[Endorsed]: Filed August 22, 1955.

[Title of District Court and Cause.]

STIPULATION REGARDING EXHIBITS

It Is Hereby Stipulated, by and between the parties hereto, through their respective counsel, that the exhibits received in evidence in this cause may be considered in their original form by the United States Court of Appeals for the Ninth Circuit in connection with the pending appeal, and need not be printed.

Dated: This 8th day of November, 1955.

/s/ KATHLEEN PARKER,
Attorney for Plaintiff
LAUGHLIN E. WATERS,
United States Attorney
MAX F. DEUTZ,
Assistant U. S. Attorney, Chief
Civil Division
/s/ JAMES R. DOOLEY,
Assistant U. S. Attorney,
Attorneys for Defendant

[Endorsed]: Filed November 10, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 26, contain the original

Petition to Establish Nationality of the United States;

Petition of Tam Tong Gong for Appointment of Guardian, etc.;

Order Appointing Guardian Ad Litem;

Answer;

Findings of Fact and Conclusions of Law;

Judgment Determining American Citizenship;

Notice of Appeal;

Order Extending Time Within Which to Docket Appeal;

Designation of Record on Appeal;

Stipulation Regarding Exhibits; and a full, true and correct copy of the Minutes of the Court for June 2, 1955, which, together with one volume of reporter's transcript of proceedings for June 2, 1955; and the original plaintiff's exhibits 1-9, inclusive and defendant's exhibits A-C, inclusive, in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has not been paid by appellant.

Witness my hand and the seal of said District Court, this 16th day of November, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk

In the United States District Court, Southern District of California, Central Division

[Title of Causes 14293-14894-14895.]

TRANSCRIPT OF PROCEEDINGS
(Portion)

Los Angeles, Calif., Thursday, June 2, 1955

Honorable Harry C. Westover, Judge presiding.

* * * * *

Miss Parker: If the court please, I would like to introduce in evidence the passport files in these cases.

Mr. Dooley: Your Honor, in that connection, we have a situation where it is advantageous to introduce the files, so the plaintiff introduces them. Otherwise, when we seek to get them introduced, they are refused.

The Court: Do you want to introduce them? I don't care who introduces them.

Mr. Dooley: It is stipulated. No objection, your Honor.

The Court: Do you want them introduced as a defendant's exhibit?

Mr. Dooley: I would like to be able to withdraw them.

The Court: I will make an order they can be withdrawn regardless of whether they are introduced as a plaintiff's or defendant's exhibit.

Mr. Dooley: Yes, your Honor.

The Court: At the conclusion of the trial. They may now be received in evidence as Plaintiffs' Exhibits 1 and 2.

(The exhibits referred to were received in evidence and marked as Plaintiffs' Exhibits 1 and 2.)

[Plaintiff's Exhibit 1 set out at pages 23-57.]

* * * * *

Mr. Dooley: Before I begin cross examination, I would like to make a motion to dismiss. I have it to file. I believe counsel will stipulate it can be heard today.

The Court: Is that the same sort of motion you have been filing in all these cases?

Mr. Dooley: Yes, your Honor.

The Court: It may be filed and denied on the same grounds, Mr. Dooley.

Mr. Dooley: In support of the motion, I would like to offer in evidence a statement concerning the processing of passport applications in Hong Kong.

Miss Parker: I object, your Honor.

The Court: Objection overruled. It may be received.

Mr. Dooley: This is in just one case, your Honor, 14894. In this case, the application was filed in May of 1952.

The Court: And no action was taken until the case was filed?

Mr. Dooley: There was some action. I believe the plaintiff's exhibit in evidence will show the action taken between the time of the filing.

The Court: Did they deny the application before filing of the complaint?

Mr. Dooley: No, your Honor.

The Court: When was the complaint filed?

Mr. Dooley: It was filed in December.

The Court: The government had from May to December to act upon this application.

Mr. Dooley: Yes, your Honor.

Miss Parker: I was going to add, if the court please, that the affidavits are executed within about two months of each other and filed within two months, and attached to the affidavit was a letter from me, and they don't like my letters, apparently, because they aren't ever in the file, in which I asked that they consolidate the cases and hear them all together. The two boys' cases were denied in, I believe, May 1952, and they had the affidavit in 1951 for the girl and they were asked to please hear all of them together.

The Court: The motion to dismiss is denied.

Mr. Dooley: I would like to substitute a photostatic copy. I would like to offer the statement regarding the processing of applications.

The Court: It may be received in evidence and the order is the original may be withdrawn and a photostatic copy substituted.

The Clerk: Exhibit C.

(The document referred to was received in evidence and marked Defendant's Exhibit C.)

[See pages 58-69.]

* * * * *

[Endorsed]: Filed November 14, 1955.

PLAINTIFF'S EXHIBIT No. 1
APPLICATION FOR PASSPORT
(Form for Native Citizen)
Sec. 138.81473 Hong Kong/549

Passport Issued: File Instr. 9/23/54 TW.

I, Tam Suey Jin, a Native citizen of the United States, solemnly swear that I was born at Chew Wah Lee, Toishan, Kwangtung, China, on CR 30-4-3 (4-28-41); that I am now residing at 31 Wing Wo St., 1st fl. Hong Kong, that I resided continuously in the United States from * * * and that I have resided outside the United States as follows: China and Hong Kong from birth to present.

My legal residence is unknown and I intend to return to the United States to reside permanently, within as soon as possible.

* * * * *

My father, Tam Tong Gong, was born at Lung Hong Lee, Toishan on (unknown) (age 49) and is now residing at: U. S. A.

My mother, Lee Shee, was born at unknown, on unknown and now residing at: deceased in CR 36.

My father emigrated to the United States on or about: unknown; resided continuously in the United States from: visited China in CR 37 * * *.

My mother emigrated to the United States on or about: Never. * * *

I have not been naturalized as a citizen of a foreign state; taken an oath or made an affirmation or other formal declaration of allegiance to a foreign state; entered, or served in, the armed forces of a foreign state; accepted, or performed the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof; voted in a political election in a foreign state or participated in an election or plebiscite to determine the sovereignty over foreign territory; made a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state; been convicted by court martial of deserting the military or naval service of the United States in time of war, or of committing any act of treason against or of attempting by force to overthrow, or of bearing arms against the United States.

If any of the above mentioned acts or conditions are applicable to the applicant's case, a supplementary statement under oath should be attached and made a part hereof.

I solemnly swear that the statements made on pages 1 and 2 are true, and that the photograph attached is a likeness of me.

Plaintiff's Exhibit No. 1—(Continued)

Oath of Allegiance

Further, I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic, that I will bear true faith and allegiance to the same; and that I take this obligation freely, without any mental reservation or purpose of evasion: So help me God.

/s/ [Chinese characters]

TAM SUEY JIN

(Signature in full of applicant)

/s/ [Chinese characters]

TAM HEM WING (brother)

Duly sworn to before me this 6th day of May, 1952.

/s/ FRANK J. HAUGHEY,

Vice Consul of the United States
at Hong Kong

Fee for passport, \$9.00. Fee for administering oath and preparing passport application, \$1.00. No fee for registration. Service No. 6501.

American Foreign Service Fee Stamp, \$1.00.
Stamped: May 7, 1952, Hong Kong.

[Photograph of applicant attached.]

Description of Applicant

Height: 4 feet 8 inches. Hair: black. Eyes: brown. Distinguishing marks or features: a scar behind right cheek.

Place of birth: Chew Wah Lee, Toishan.

Plaintiff's Exhibit No. 1—(Continued)

Date of birth: CR 30-4-3 (4-28-41).

Occupation: None.

Evidence of Citizenship and Identifying Documents

* * * * *

Other evidence of citizenship and identifying documents submitted, as specified below: Father's affidavit, copy retained in files.

The following should be filled in if this application is for a Passport:

Countries to be visited: U.S.A.

Port of departure: Hong Kong.

Purpose of visit: Permanent residence.

Date of departure: As soon as possible.

Affidavit to be executed by a person born abroad of an American parent who is applying for the first time for a Passport or Registration (To be used in lieu of Form No. 213 as authorized by the Department of State in A-340, dated January 20, 1951.)

I, Tam Suey Jin, solemnly swear that I was born in China and have since resided in China or in foreign colonies adjacent thereto at the following addresses:

Place: Chew Wah Lee, Toishan; period of residence: Birth—March 16, 1952.

Place: Hong Kong; period of residence: March 16, 1952—now.

During this period I have attended the following schools: Never attended school.

Plaintiff's Exhibit No. 1—(Continued)

During this period I have had the following occupations: None.

I now desire to proceed to the United States, where I expect to reside at—unknown—with Tam Tong Gong, who is my father. The evidence presented by me to establish my American citizenship was obtained for me by Tam Tong Gong, whose address is unknown, and who is my father.

I have the following brothers and sisters:

1. Tam Hem Toi; date and place of birth: unknown; marital status: unknown; present address: joined army.

2. Tam Hem Wing; date and place of birth: unknown, Lung Hong Lee; marital status: single; present address: Hong Kong.

3. Tam Hem Fook; date and place of birth: unknown, Lung Hong Lee; marital status: single; present address: Hong Kong.

4. Tam Suey Jin; date and place of birth: CR 30-4-3 (4-28-41), Chew Wah Lee.

* * * * *

/s/ [Chinese characters]

TAM SUEY JIN (Signature)

/s/ [Chinese characters]

TAM HEM WING (brother)

Subscribed and sworn to before me, Frank J. Haughey, Vice Consul of the United States of

Plaintiff's Exhibit No. 1—(Continued)

America in and for the consular district of Hong Kong, duly commissioned and qualified, this 6th day of May, 1952.

/s/ FRANK J. HAUGHEY,
Vice Consul of the United
States of America

Department of State Instruction 2073
No.: A-184, September 23, 1954. Unclassified

Subject: Citizenship—Hong Kong despatch No. 120, dated July 20, 1954.

To: The American Consulate General, Hong Kong.

Passport applications in following names disapproved on ground that identity of applicants has not been established: Der Wah On, Der On Wai, Lee Gat Chew, Lee Shew Way, Tam Suey Jin, including Der Mee Lai.

Passport applications in following names disapproved on ground that available evidence indicates that applicants are not persons they purport to be: Lee Shew Lan, Sue Young May.

It is noted that person claiming to be Sue Young May, mentioned above, insists that she is true daughter of alleged father, despite blood-type evidence, although she has withdrawn application.

Following cases will be subjects of separate communications: Chow Kai Mon, Lee Sing Fook.

Cases transmitted under cover of despatch under reference with recommendations for approval are subjects of individual instructions.

Plaintiff's Exhibit No. 1—(Continued)

Department is taking appropriate action on passport applications transmitted as abandoned with despatch under reference.

Smith (Acting)

138.81473 Hong Kong/549

Approved by: R. B. Shipley, Director, Passport Office.

Drafted by: PD:TFWaterman:la 9/21/54.

American Consulate General, Hong Kong

OPINION OF CONSULAR INVESTIGATION

July 13, 1954

I. Opinion and Recommendation of Examining Officer

In view of the circumstances described in the attached Report of Consular Investigation, it is my opinion that the identity of the person purporting to be TAM Suey Jin has not been established. I therefore recommend that the Department disapprove her passport application.

/s/ Imogene E. Ellis,
American Vice Consul

July 15, 1954

II. Decision of Reviewing Officer

I concur in the above recommendation.

/s/ Gilda R. Duly,
American Vice Consul

Plaintiff's Exhibit No. 1—(Continued)
American Consulate General, Hong Kong,
July 13, 1954

REPORT OF CONSULAR INVESTIGATION

Passport application of TAM Suey Jin; executed:
May 6, 1952.

I. Basis of Claim:

TAM Suey Jin, born April 28, 1941, claims to have derived American citizenship under the Act of May 24, 1934 by birth abroad of an American citizen, TAM Tong Gong, whose claim to American citizenship is also derivative.

II. Documentary Evidence:

1. Affidavit on behalf of her claim executed by the alleged father at Los Angeles on November 12, 1951.

On March 3, 1954, the alleged father was requested by letter to submit reliable evidence of the claimed relationship, but, to date, nothing further has been received.

III. Family Background:

The applicant is the youngest child of a family of three sons and one daughter. The oldest son joined the army, date not given, and his whereabouts is not known. The other two brothers are in Hong Kong. They were refused documentation at this office in May, 1952, on the grounds that investigations conducted by this office revealed that they were not in fact related to one another. The alleged father has three brothers, all of whom are

Plaintiff's Exhibit No. 1—(Continued)

in the United States. Nothing is known about their families. The applicant was not able to give the birthdates of her brothers. The alleged mother is deceased.

TAM Tong Gong was first admitted into the United States at Seattle on May 23, 1923. At that time he reported his marriage to Lee Shee and the birth of his oldest son. He made three subsequent journeys to China during which time all the children claimed could have been born. Lee Shee reportedly died in 1947 and TAM Tong Gong married a second time to Au Shee on October 28, 1948.

IV. Consular Investigation:

The results of blood type determinations of the applicant, her alleged father and alleged two older brothers show compatibility.

Father: TAM Tong Gong, group A, type M.

Daughter: TAM Suey Jin, group A, type MN.

Son: TAM Hem Wing, group O, type M.

Son: TAM Hem Fook, group A, type MN.

2. Radiological Examinations.

The results of radiological examinations of the applicant and her alleged brothers indicate that they could all be about the age claimed.

3. Immigration and Naturalization Service Reports.

Reports from the Immigration and Naturalization Service at San Pedro, Los Angeles, San Francisco and Seattle contain no adverse information.

Plaintiff's Exhibit No. 1—(Continued)

4. Interview.

TAM Suey Jin and her alleged two brothers were interrogated at this Office on March 3, 1953 by Vice Consul Burton Kitain. The testimony which was given under oath cast doubt on the claimed relationship. The applicant maintained that the two alleged brothers were, indeed, blood brothers to her and that they had the same father and mother. She knew nothing about her father; she could not remember when he was last in China though she was about 12 years of age at the time; she does not live with her alleged brothers in Hong Kong and does not know their address.

V. Opinion:

TAM Suey Jin has not been identified as the daughter of an American citizen. In fact, all aspects of this case point to a fraudulent claim to citizenship. Her two identifying witnesses were alleged older brothers who have already been refused as not being persons they claim to be. There is absolutely no evidence of the claimed kinship. The applicant showed surprising ignorance of details of the family if, indeed, she is a member of such a group. It is, therefore, recommended that her passport application be refused.

/s/ Imogene E. Ellis,
American Vice Consul

IEEllis/ew

Plaintiff's Exhibit No. 1—(Continued)

American Consulate General, Hong Kong

3/25/53

MEMORANDUM

Subject: Testimony taken in connection with Passport Application of TAM Suey Jin.

Persons Interviewed: Witnesses TAM Hem Wing (bro.), TAM Hem Fook (bro.).

Examiner: Burton Kitain.

1. Testimony of TAM Suey Jin. (Interpreter: Mrs. Annie Chiu.)

This person, after being placed under oath to tell the truth by a duly commissioned and qualified consular officer, testified as follows:

Q. What is your name?

A. Tam (Hom) Suey Jin—no others.

Q. In what dialect are you testifying?

A. Toishan.

Examiner to applicant: If you do not understand any of the questions put to you in this interview or if you have difficulty in understanding the interpreter, you must inform me of the fact at once during the course of the interview. Do you understand?

A. Yes.

Q. Do you have any additional evidence in support of your passport application which you wish to present at this time? A. No.

Q1. When was the last time you saw your father?

A. I do not remember when; it was in the vil-

Plaintiff's Exhibit No. 1—(Continued)

lage; I was too young; I was never told. (Note: Father claims last trip 1947-48.)

Q2. When did your mother die?

A. I do not remember.

Q3. Was she in the house when she died?

A. Yes. I was present.

Q4. Was she ill before she died?

A. Yes, but I don't know whether it was for an hour or for a month. It was not a year.

Q5. Was anybody else in the house when she died?

A. Two brothers and neighbor "Aunt" Lim—that's all I remember.

Q6. Have you been living with your brothers here in HK?

A. I have been living with them up to recently; then the two of them moved back to HK a short time ago—Last year, 6th month or moon. I live at 29 Shik Yik Mee village, Sui San Rd., Kowloon since last year, 6th month or moon; when I first came last year, 3rd moon, I joined my brothers who were living at the Loon Hing Sing Co., 31 Wing Wo St., HK. They moved over to Kowloon with me but didn't like the place so they sent away; I don't know where they're living now.

Q7. How did you get in touch with them?

A. They were waiting for me at the corner of Wing Wo St. when I came to meet them to go to the Consulate. (Note: C/L went to Wing Wo St. address.)

Q8. Why did you move to Kowloon?

Plaintiff's Exhibit No. 1—(Continued)

A. This "Aunt" Lim told me to go to live with her sister; she sent a letter out to us about the 5th moon of last year and told us to go to live with her sister.

Q9. What relation is this "Aunt" Lim to you?

A. No relation; just a fellow villager; she thought I would be better off; at that time I was sharing a loft with my two brothers.

Q10. Have you ever taken any pictures with your father? A. No.

Q11. Have you ever received any letters from your father?

A. No, he only sends them to my brothers.

Q12. Did you attend your father's 2nd wedding?

A. No, he married in HK.

Q13. Have you ever made any previous trips to HK? A. No.

Q14. Do you swear that both of the witnesses are your blood brothers; sons of the same person you claim to be your father? A. Yes.

Q15. Do you care to make a true statement of the identity of these persons?

A. They are my brothers.

Q16. What is the name of your true father?

A. TAM (HOM) Tong Gong, no other names that I know of.

Testimony of TAM Hem Wing. (Interpreter: Mrs. Eleanor Ng.)

This person, after being placed under oath to tell

Plaintiff's Exhibit No. 1—(Continued)
the truth by a duly commissioned and qualified consular officer, testified as follows:

Q. What is your name?

A. TAM (HEM) Wing—no other names.

Q. What is your relationship to TAM Suey Jin?

A. I'm her second brother.

Q. In what dialect are you testifying?

A. Toishan.

Examiner's instruction: If you do not understand any of the questions put to you in this interview or if you have difficulty in understanding the interpreter, you must inform me of the fact at once during the course of the interview. Do you understand?

A. Yes.

Examiner's Note: This person was thereupon questioned concerning matters discussed in the testimony recorded above, and his replies were in substantial agreement with the exception of the following discrepancies:

Q. Have you ever been known as TAM Wing Fook? A. No.

Q. Have you ever known a person by the name of TAM Chan Lim? A. No.

Note: Applicant was again queried about Q6. and stated that she and two brothers moved to Kowloon in the CR41-6—the brothers remained until end of CR 41-6 and then moved back and have been living here ever since. First witness says that they moved from Kowloon to HK on Mar. 19, 1953. Ap-

Plaintiff's Exhibit No. 1—(Continued)

plicant says aunt took her to meeting place this morning—first witness agrees.

Testimony of TAM Hem Fook. (Interpreter: Mrs. Elsie Lum.)

This person, after being placed under oath to tell the truth by a duly commissioned and qualified consular officer, testified as follows:

Q. What is your name?

A. TAM (HOM) Hem Fook—no other names.

Q. What is your relationship to TAM Suey Jin?

A. I'm her third elder brother.

Q. In what dialect are you testifying?

A. Toishan.

Examiner's instruction: If you do not understand any of the questions put to you in this interview or if you have difficulty in understanding the interpreter, you must inform me of the fact at once during the course of the interview. Do you understand? A. Yes.

Examiner's Note: This person was thereupon questioned concerning matters discussed in the testimony recorded above, and his replies were in substantial agreement with the exception of the following discrepancies:

Q. Have you ever heard of TAM Chan Lim?

A. No.

Q. Have you ever heard of TAM Wing Fook?

A. No such person.

Q6. (Same story as first witness.)

Note: Second witness when confronted with the

Plaintiff's Exhibit No. 1—(Continued)
discrepancy in Q6. insists that he and first witness moved to HK only this year.

Q. Do any of you have any further statements to make? A. No.

Note: First witness repeats statement that they moved to Kowloon beginning of CR 41-6 and he and second witness moved back on Mar. 19, 1953. No explanation for the discrepancy.

/s/ [Chinese characters]
TAM SUEY JIN

/s/ [Chinese characters]
TAM HEM WING

/s/ [Chinese Characters]
TAM HEM FOOK

/s/ B. KITAIN, Examiner

Attachment to Memorandum of Testimony in the
Citizenship case of TAM Suey Jin, 3/25/53.

Certificate of Examiner

It appearing that the above-named claimant(s) and the witnesses in this case could not understand or intelligently testify in the English language and did well understand the Chinese language, the dialect of Toishan District, Kwangtung Province, the following persons, who also well understand that language, were employed as interpreters: Mrs. Annie Chiu, Mrs. Eleanor Ng, Mrs. Elsie Lum. These persons are official interpreters on the staff of the American Consulate General at Hong Kong.

Plaintiff's Exhibit No. 1—(Continued)

I certify that the preceding record of testimony in the above-cited case was taken down by me on the typewriter during the course of the interviews and is an accurate representation of questions put by me in English and of responses given in Chinese as interpreted into English by the above-named interpreters.

/s/ B. Kitain, Vice Consul

Certificate of Interpreter

I certify that I know the English language and the Chinese language, dialect of Toishan District, Kwangtung, and that I have truly and impartially interpreted the questions put to TAM Suey Jin by the above-named examiner on this date, out of the English language into the Chinese of the dialect mentioned and that I have truly and impartially interpreted the answers of said person thereto out of the Chinese into the English language.

/s/ Annie Chiu, Interpreter

Certificate of Interpreter

I certify that I know the English language and the Chinese language, dialect of Toishan District, Kwangtung, and that I have truly and impartially interpreted the questions put to TAM Hem Wing by the above-named examiner on this date, out of the English language into the Chinese of the dialect mentioned and that I have truly and impartially interpreted the answers of said person thereto out of the Chinese into the English language.

/s/ Eleanor Ng, Interpreter

Plaintiff's Exhibit No. 1—(Continued)

Certificate of Interpreter

I certify that I know the English language and the Chinese language, dialect of Toishan District, Kwangtung, and that I have truly and impartially interpreted the questions put to TAM Hem Fook by the above-named examiner on this date, out of the English language into the Chinese of the dialect mentioned and that I have truly and impartially interpreted the answers of said person thereto out of the Chinese into the English language.

/s/ Elsie Lum, Interpreter

Case of TAM Suey Jin

[Photograph attached]

Certified to be true likeness of TAM Hem Wing (alleged brother) witness in the above named case.

/s/ B. Kitain, Examiner

[Photograph attached]

Certified to be a true likeness of TAM Hem Fook (alleged bro.) witness in the above named case.

/s/ B. Kitain, Examiner

Plaintiff's Exhibit No. 1—(Continued)

West Coast Medical Laboratories, Inc., Chemists,
Bacteriologists, 610 So. Broadway, Los Angeles
14, California.

U. S. Department of Immigration

Laboratory Report

Patient: TAM Tong Gong; specimen: Venous
Blood; examination: Parentage. Date: Apr. 15,
1954.

Blood Group: "A"

MN Factors: "M" positive; "N" negative.

MN Type: Type "M"

/s/ By [Illegible], M.D.

[Stamped] Consulate General of the United States
of America, Apr. 27, 1954, Hong Kong.

University of Hong Kong
Office of the Vice Chancellor

26th March, 1953

Tam Suey Jin, Tam Hem Wing, Tam Hem Fook.

It is possible for these three applicants to be
blood brothers and sister of the following matings:
Group "A" with Group "O", "A" or "B" and Type
"MN" with Type "M" or "MN".

Neither parent may belong to Group "AB" nor
can either be Type "N".

/s/ L. T. Ride,

M.A., D.M., M.R.C.S., L.R.C.P., Vice Chancellor of
the University of Hong Kong.

Plaintiff's Exhibit No. 1—(Continued)
The Foreign Service of the United States of
America

American Consulate General, Hong Kong,
March 25, 1953

Dr. L. T. Ride, Hong Kong University, Hong Kong

Dear Dr. Ride:

Please blood type the persons described below and whose photographs are affixed under seal, indicating your findings in the appropriate spaces. The expenses incurred by this examination are to be borne by the examinees.

Very truly yours,

/s/ W. J. Orndorff,
American Vice Consul

1. Name: TAM Suey-Jin; height: 4 ft. 10 inches; relationship: sister; weight, 72 lbs.

Blood Group: "A"; Blood Type (MN): M pos.
N pos.

2. Name: TAM Hem-wing; height: 5 ft. 6¼ inches; relationship: brother; weight: 132 lbs.

Blood Group: "O"; Blood Type (MN): M pos.
N neg.

3. Name: TAM Hem-fook; height: 5 ft. 5½ inches; relationship: brother; weight: 103 lbs.

Blood Group: "A"; Blood Type (MN): M pos.
N pos.

[Three photographs attached.]

26th March, 1953.

Plaintiff's Exhibit No. 1—(Continued)

I certify that on this date I have examined for blood type the persons who are described above and whose photographs are affixed under seal, and that the results recorded above are true and correct.

/s/ L. T. Ride,

M.A., D.M., B.C.L., M.R.C.S., L.R.C.P., Vice Chancellor of Hong Kong University.

Dr. Ernest To, Dr. H. K. B. Armstrong
114/115 Edinburgh House (1st Floor)

Your Reference: 221 TAM Suey-jin.

30th March 1953

[Stamped]: Consulate General of the United States
of America, Mar. 30, 1953, Hong Kong.

Name: TAM Suey Jin (F)* Estimation of age.

Alleged Age: 11 years 11 months. Born: April 28,
1941.

Personal History

Country or Town bred: Country—Toishan. Home conditions: Good.

Occupation: Idle since leaving school a year ago.

Outdoor Sports: None.

Previous illnesses: None.

Position, with date, of last tooth to erupt: Cannot remember.

Any additional information: Parents of medium stature.

Plaintiff's Exhibit No. 1—(Continued)

Clinical Examination

Height: 57½". Weight: 73 lbs. Physique: Poor.

Body proportions: (a) upper segment 28½"; (b) lower segment 29"; span 57½".

No obvious external physical defect.

No clinical evidence of any debilitating disease.

Dental Development

Condition of teeth: No crowding.

No. Teeth (a) upper jaw: 14; (b) lower jaw: 14.

Stage of eruption: 2nd molar erupted fully.

Dental Radiological findings: 2nd molar roots not fully formed. Crown of 3rd molar forming.

Sexual Development

Voice: Childish. Hirsutism: none. Hair: (a) Pubic none; (b) Axillary none; (c) Chest none.

(b) Females:

External Genitals: Juvenile.

Breasts: Mammary bud not yet formed (juvenile state).

Osseous Development

(Radiological Estimation): Radiographs No. K 33.

Acromion not appeared (15 for male).

Sesamoid bone of thumb appeared (14 for male).

Olecranon appeared (11 for male).

Pisiform bone appeared (12 for male).

Estimated Age: 14 years for male, but since ossification takes place 1-3 years earlier in the female, subject's age would be about 11-13 years.

Plaintiff's Exhibit No. 1—(Continued)

3285, 315. Conclusions

Apparent Age: 11-12 years.

Sexual Development: under 11 years.

Dental Development: about 13 years.

Osseous Development: 11-13 years.

Her developmental age is 11-13 years. Since the clinical examination suggests that the developmental age may be expected to be less than the actual age, we estimate her to be about 13 years of age. However it would be difficult, if not impossible on clinical grounds alone, to disprove that she is not the age claimed.

/s/ H. K. B. Armstrong,
L.R.C.P., L.R.C.S. (Edin.)

/s/ Ernest To, M.B., B.S.

Dr. Ernest To, Dr. H. K. B. Armstrong
114/115 Edinburgh House (1st Floor)

Your Reference: 221 TAM Suey-jin.

30th March 1953

[Stamped]: Consulate General of the United States
of America, Mar. 30, 1953, Hong Kong.

Name: TAM HEM WING* Estimation of Age.

Alleged Age: 23 years 3 months. Born: December
18, 1929.

Personal History

Country or Town bred: Country—Toishan. Home
conditions: Good.

Plaintiff's Exhibit No. 1—(Continued)

Occupation: Chinese cook for past four years.

Outdoor Sports: None.

Previous illnesses: None.

Position, with date, of last tooth to erupt: cannot remember.

Any additional information: Parents of medium stature.

Clinical Examination

Height: 65½". Weight: 134 lbs. Physique: Good.

Body proportions: (a) upper segment 32½"; (b) lower segment 32½"; span 67".

No obvious external physical defect.

No clinical evidence of any debilitating disease.

Dental Development

Condition of teeth: Good—no crowding.

No. Teeth (a) upper jaw: 16; (b) lower jaw: 16.

Stage of eruption: 3rd molar erupted.

Dental Radiological findings: 3rd molar roots calcified.

Sexual Development

Voice: Adult. Hirsutism: moderate degree. Hair: (a) Pubic abundant; (b) Axillary abundant; (c) Chest abundant. Pubic hair abundant and spreading upwards.

(2) Males: External Genital: Adult proportions. Testes: (a) size moderate; (b) Consistency: crepe-rubber.

Osseous Development

(Radiological Estimation): Radiographs No. K 31.

Medial end of clavicle almost fused (25).

Plaintiff's Exhibit No. 1—(Continued)

Lower end of radius fused (20).

Crest of ilium and ischial tuberosity fused (20-25).

Estimated Age: 24-25 years.

Conclusions

Apparent Age: Mid twenties.

Sexual Development: 21 years and upwards.

Dental Development: 23 years or more.

Osseous Development: 24-25 years.

His development age is 24-25 years. Since the clinical examination suggests that the developmental age may be expected to approximate or even exceed the actual age, we estimate him to be 23-24 years of age. Therefore in our opinion he could have been born on the date claimed.

/s/ H. K. B. Armstrong,
L.R.C.P., L.R.C.S. (Edin.)
/s/ Ernest To, M.B., B.S.

Dr. Ernest To, Dr. H. K. B. Armstrong
114/115 Edinburgh House (1st Floor)

Your Reference: 221 TAM Suey-jin.

27th March 1953

[Stamped]: Consulate General of the United States
of America, Mar. 27, 1953, Hong Kong.

Name: Tam Hem Fook * Estimation of Age.

Alleged Age: 21 years 11 months. Born: April
22, 1931.

Plaintiff's Exhibit No. 1—(Continued)

Personal History

Country or Town bred: Country—Toishan. Home conditions: Good.

Occupation: Idle since leaving school five years ago.

Outdoor Sports: Swimming.

Previous illnesses: None.

Position, with date, of last tooth to erupt: Cannot remember.

Any additional information: Parents of medium stature.

Clinical Examination

Height: 65". Weight: 100 lbs. Physique: Poor. Body proportions: (a) upper segment $32\frac{1}{2}$ "; (b) lower segment $32\frac{1}{2}$ "; span $67\frac{1}{2}$ ".

No obvious external physical defect.

No clinical evidence of any debilitating disease.

Dental Development

Condition of teeth: Minor crowding in lower jaw. No. Teeth (a) upper jaw: 14; (b) lower jaw: 14. Stage of eruption: 3rd molar not seen.

Dental Radiological findings: Roots of the unerupted 3rd molar are not yet fully calcified.

Sexual Development

Voice: Adult. Hirsutism: none. Hair: (a) Pubic moderate; (b) Axillary scanty; (c) Chest none.

(a) Males: External Genitals: adult proportions. Testes: (a) size moderate; (b) Consistency: crepe-rubber.

Plaintiff's Exhibit No. 1—(Continued)

Osseous Development

(Radiological Estimation): Radiographs No. K 32.

Medial end of clavicle not appeared (21).

Lower end of radius fused (20).

Crest of ilium and ischial tuberosity fused (20-25).

Estimated Age: About 20 years.

Conclusions

Apparent Age: Late teens, early twenties.

Sexual Development: 21 years and upwards.

Dental Development: Over 20 years and under 24 years.

Osseous Development: About 20 years.

His developmental age is over 20 years but under 23. Since the clinical examination suggests that the developmental age may be expected to be less than the actual age, we estimate him to be about 21-22 years of age. Therefore in our opinion he could have been born on the date claimed.

/s/ H. K. B. Armstrong,
L.R.C.P., L.R.C.S. (Edin.)

/s/ Ernest To, M.B., B.S.

Plaintiff's Exhibit No. 1—(Continued)

Air Mail

March 15, 1954 7030/3418

[Stamped]: Consulate General of the United States
of America, Mar. 22, 1954, Hong Kong.

The Honorable American Consul General
American Consulate General
Hong Kong, B.C.C.

Dear Sir:

Please refer to your letter of March 3, 1954, in which it is requested that this office furnish a report as to the citizenship and family status of Tam (Hom) Tong Gong for use in considering the United States citizenship claim of his alleged son, Tam Suey Jing, born April 28, 1941. The following is a complete resume of pertinent material contained in our file, including summarized transcripts of essential testimony.

Tom Tong Gong first came to the attention of this office on May 17, 1923, at which time he arrived on the SS President Jefferson and applied for admission as a citizen of the United States. He was accorded hearing before a Board of Special Inquiry on May 23, 1923.

During the course of the hearing the subject testified that his name was Tom Tong Gong (Jui Song) and that he was a member of the Hom family. He alleged that he was born 17-5-KS 29 (June 12, 1903) and that the name of his father was Tom Hong Get (Yick Moon). His mother was listed as Lee Shee, 49 years old, bound foot woman from Woon Bin Village. He alleged that he had

Plaintiff's Exhibit No. 1—(Continued)

three brothers, as follows: Chuk Gong (Yui Foo), 30 years of age, married to Fong Shee, natural foot woman, and father of one son, Chin Fook, 10 years old; Yim Gong (Yuen Gay), 25 years old, married to Fong Shee, natural foot woman, and the father of one son, Yim Soo, 6 years old; and Pok Gong, married to Lee Shee, natural foot woman, and father of one son, Him En, born 23-2-R11. The applicant stated that he was married to Lee Shee, natural foot woman from Hong Hing Lee village on 3-3-R9. He indicated that he was the father of one son, Him Poy, born 24-3-R10.

The paternal grandparents of the subject were listed as Hoy Sheuk, deceased ten years previously, buried in Gut San Hill, and Lim Shee, natural foot woman, deceased nine years previously. The maternal grandparents were described as Sin Gong, deceased, and Lim Shee, deceased. The applicant's father allegedly had two brothers, Ham Hong Wing, residing in San Francisco who was married to Lee Shee, bound foot woman and the father of two sons, Seuk King, 13 years of age, and Look King, 11 years old; and Om Yon Goon, residing in San Francisco, 45 years of age, married to Lee Shee, bound foot woman, and the father of two sons, Seung Hen, 17 years old, and Pok Hen, 16 years old. It was alleged that the applicant's mother did not have any brothers or sisters.

The Long Hong Wee village was described as being composed of about 30 houses with 7 rows facing south. The family home was reportedly the first

Plaintiff's Exhibit No. 1—(Continued)

house in the first row from the west and was a regular 5-room Chinese house. There was allegedly a fish pond in the front of the village and there was no wall around the village. The village secured their water from a community well located on the east side of the village. The family allegedly patronized a market in the Sun Ning City located 6-7 lis west of the home village. The applicant later testified that the village faced north, rather than south.

The subject was accompanied to the United States by his brother Tom Pok Gong, who stated that he was born 8-8-KS 30 in the Long Hong Village. He stated that he was married; that his marriage name was Yuey Toon; that his wife's name was Lee Shee, natural foot woman from Sai Hong Lee village to whom he was married on 4-4-R10. He alleged that he was the father of one son, Him En, born 23-2-R11. He furnished information concerning the village which corroborated the testimony given by the subject of your correspondence.

Following the hearing decision on the application was deferred pending an investigation at New York. On June 4, 1923, Tam Hong Ket (Get) appeared at the New York office as a witness in behalf of his sons. He stated that he was married, that his marriage name was Yik Moon. He testified that he was born in San Francisco, California, and was 50 years of age. He was in possession of certified copy of a court record discharging Tam Hong Get on September 26, 1896.

The father of the applicant furnished substanti-

Plaintiff's Exhibit No. 1—(Continued)

ally the same as that furnished by the applicant and on June 18, 1923, the Board of Special Inquiry in the case of the applicant and his brother was reconvened and both applicants were admitted as citizens of the United States. Certificate of Identity 47044 was issued in behalf of the subject on June 21, 1923.

Tam (Hom) Tong Gong departed from the United States on Dec. 29, 1928, from the Port of Seattle, Washington, on the SS Pres. Grant. He was in possession of Form 430 issued by the District Office of this Service at New York. In a sworn statement made at the New York office on October 19, 1928, subject stated that he was married to Lee She on CR 9-3-3 (April 21, 1920), at the Long Hung Village, China. He stated that he was the father of one son, Tam Toy, 7 years old.

On December 29, 1931, the subject returned to the United States at Seattle, Washington, ex SS President Madison, and was admitted as a citizen of the United States. He testified at that time that he was married one time only to Lee Shee and was the father of three sons. He stated that he had previously registered one son with this Service and furnished the names of the following sons: Heong Wen, born R18-11-18 and Heong Fook, born R20-3-5.

This office has been unable to locate any additional record of entry or departure which may be identified as pertaining to the subject of your correspondence.

Plaintiff's Exhibit No. 1—(Continued)

Our files indicate that on April 2, 1948, the Department of State requested information from our files in the case of the subject. The requested report was forwarded on May 13, 1948.

Seattle file 7030/10095 pertains to Tom Lim Gong, brother of the subject who was admitted to the United States as a citizen of the United States on April 20, 1938 at San Francisco, California.

Seattle file 7030/1719 covers Tam Pok Gong, an alleged brother of the subject who was admitted to the United States the same time as Tom Tong Gong.

Respectfully,

JOHN P. BOYD,

District Director Seattle District

Re: Tam Suey Jin

Applicant for Passport to Proceed to the United States as a citizen thereof under the provisions of State Department Regulation entitled "Passport for and Registration of American Citizens in Foreign Countries", dated April 17, 1945.

[Stamped]: Consulate General of the United States of America, May 5, 1952, Hong Kong.

AFFIDAVIT

State of California,
County of Los Angeles—ss.

Tam (Hom) Tong Gong, being duly sworn, deposes and says:

Plaintiff's Exhibit No. 1—(Continued)

That he is a citizen of the United States, Section 1993, holding Certificate of Identity No. 47044 issued to him at Seattle, Washington on June 20, 1923, showing his admission at Seattle, Washington as son of native, ex SS President Jefferson on May 17, 1923, file No. 41375/12-29 (Seattle file No. 7030/3418).

That affiant was born on October 5, 1903 (KS 29-8-15) at Lung Hong Village [Chinese characters] Toi Shan, China.

That affiant has made three trips to China, as follows:

Departed from Seattle on October 28, 1928, on SS President Grant.

Returned to Seattle on December 29, 1931, on SS President Madison.

Departed from San Pedro on April 8, 1940, on SS President Coolidge.

Returned to San Pedro on August 1, 1941, on SS President Pierce.

Departed from San Francisco on July 30, 1947, on SS Gen. Meigs.

Returned to Los Angeles on March 22, 1949, on Pan American Airlines.

That affiant was married two times only. That affiant's first marriage was to Lee Shee [Chinese characters] on April 21, 1920 (CR 9-3-3) at Lung Hong Village, Toi Shan, China. That said Lee Shee was born at Tung Hing [Chinese characters] Village, Toi Shan. That said Lee Shee died on August 8, 1947 (CR 36-6-22) in Chew Wah Village.

Plaintiff's Exhibit No. 1—(Continued)

[Chinese characters] That affiant and said Lee Shee have four children, as follows:

Tam Hem Toil [Chinese characters] Born April 11, 1921 (CR 10-3-4) at Lung Hong Village. Now missing, present address unknown.

Tam Hem Wing [Chinese characters] Born December 18, 1929, (CR 18-11-18) at Lung Hong Village and now residing in Hong Kong.

Tam Hem Fook [Chinese characters] Born April 22, 1931 (CR 20-3-5) at Lung Hong Village and now residing in Hong Kong.

Tam Suey Jin [Chinese characters] Born April 28, 1941 (CR 30-4-3) at Chew Wah Village and now residing in Hong Kong.

That affiant's second marriage was to Au Wei Jin [Chinese characters] on October 18, 1948, at Hong Kong, China; that said Au Wei Jin was born on August 22, 1920 (CR 9-7-9) at Canton, China; that said Au Wei Jin entered the United States at Los Angeles, California via Pan American Airlines on March 22, 1949.

That affiant's daughter, Tam Suey Jin, has never been married; that she has never been to the United States and it is affiant's desire to have his said daughter come to the United States and reside with affiant in Los Angeles, California; that affiant is willing and able to support his said daughter, Tam Suey Jin.

That under the provisions of Section 210 and 504 of the United States Nationality Act (54 Stats. 1137, 8 U.S.C. 907) his said daughter is a national and citizen of the United States at birth, and as

Plaintiff's Exhibit No. 1—(Continued)

such, is applying for a permit to proceed to the United States and take up residence therein; that affiant is making this affidavit as the father of the aforesaid passport applicant, as provided by the State Department Regulation dated April 17, 1945, because no birth or baptismal certificates were made at the time of the birth of affiant's daughter, Tam Suey Jin, and are therefore not available for submission herewith.

That affiant desires to have said applicant apply for admission to the United States at Los Angeles (San Pedro) California because it is the port of entry nearest and most convenient to affiant's place of residence, namely, 935½ Towne Avenue, Los Angeles 15, California.

That the photographs attached hereto correctly represent affiant and his said daughter, Tam Suey Jin; that photograph No. "1" is of affiant and photograph No. "2" is affiant's said daughter, Tam Suey Jin.

/s/ Tam Tong Gong

[Photographs No. 1 and 2 attached]

Subscribed and sworn to before me this 12th day of November, 1951.

[Seal] /s/ Billy W. Lew,

Notary Public in and for the County of Los Angeles, State of California.

Verification of Tam Tong Gong photograph attached.

[Department of State certification of true copy attached]

DEFENDANT'S EXHIBIT C

Statement Regarding the Processing of Passport Applications at the American Consulate General in Hong Kong

When the American Consulate General at Canton, China, closed as a result of the advance of Chinese Communist Forces in August 1949, approximately 2,000 citizenship claims initiated at Canton between January 1, 1948, and August 15, 1949, were transferred to Hong Kong. These were claims in connection with which adequate evidence of the identity of the claimants had not been submitted up to the closing of the Consulate General at Canton, and which, accordingly, required detailed examination and interrogation of the applicants and available identifying witnesses. The heavy work of processing the claims forwarded from Canton was thus added to the normal work previously performed by the Consulate General at Hong Kong.

In order that the Hong Kong Consulate General, which was initially handicapped by lack of sufficient office space and living space for additional personnel in the overcrowded Colony, might cope with the increased workload, the Department took the following steps at once:

- (1) Procedures for processing cases were altered to provide for speedier action by resolving the doubt in a case in favor of the applicant whenever possible after a minimum of examination of the applicant and witnesses.

Defendant's Exhibit C—(Continued)

(2) The staff at Hong Kong was increased as fast as possible in the light of the availability of qualified personnel, funds, and office and living space in the Colony.

During the period from September 1, 1949, to August 31, 1950, additional claims to American citizenship were presented at Hong Kong at the rate of 150 per month, or approximately 1800 for the year. It was not possible during that year to effect a net increase in the staff sufficient to process both the backlog of cases received from Canton and the new cases constantly accruing, in view of the incidence of statutory leave for personnel, necessary transfers of personnel to other Foreign Service posts, and the fact that sufficient office space could be made available only after July 1, 1950, when a new office building for the Consulate General was completed. Insofar as possible, claims were processed in the chronological order of their initiation; emergency cases, such as those of persons who were required to proceed to the United States prior to their sixteenth birthdays to retain American citizenship under the law then in effect, were, however, processed on a priority basis. The large number of such emergency cases requiring immediate processing resulted in further delay in non-emergency cases. Because of the unavoidable delays in processing, affecting a large number of cases, correspondence and other incidental clerical work necessarily increased to an abnormal degree. The processing of claims was hampered by the impossi-

Defendant's Exhibit C—(Continued)

bility of checking statements as to residence, family circumstances, and actual names, or the validity of documents, on the mainland of China, where nearly all the claimants alleged that they were born and had resided up to the time of their sudden departure from their native villages for Hong Kong, following the advance of the Chinese Communist Army. Persons whose claims were fraudulent naturally took advantage of this situation to furnish as little "evidence" and as little information about themselves as possible. For the above reasons primarily, the backlog of pending cases had reached 3600 by September 1, 1950; in other words, it had been possible to complete action on only about 200 of these doubtful claims during the year. It must be noted, however, that during this year, 345 passports were issued to persons who established their identity and citizenship in the manner prescribed by the Foreign Service Regulations. The delayed cases were all cases in which it was necessary to try to obtain and evaluate secondary evidence of identity and citizenship, since the claimants were unable to submit the normal documentary evidence available elsewhere in the world, or presented documentary evidence the reliability or authenticity of which was questionable.

The situation at Hong Kong was so serious that, additional office and living space having become available, the Department in November 1950 assigned a Foreign Service Inspector, two Departmental employees, and fourteen members of the

Defendant's Exhibit C—(Continued)

Foreign Service to Hong Kong, and authorized the employment of sufficient local alien personnel to serve as interpreters and give clerical assistance, to work on the backlog of pending citizenship claims in an effort to process them all at the earliest possible date, while continuing the work on the cases still coming in at the rate of approximately 150 per month.

By July 1, 1951, the backlog of pending claims antedating September 1, 1950 had been reduced to approximately 2100 cases, not all of which were "live", however, since in some 600 of them there was no means of communicating with the claimants because of inadequate addresses, or the claimants were detained on the mainland of China. Over 1000 claimants were documented with Travel Affidavits for travel to the United States. During this period, in addition, 550 passports were issued to persons who were properly identified and who possessed documentary evidence of their eligibility for passports as set forth in the Foreign Service Regulations. Between July 1, 1951 and July 1, 1952, 2609 cases were processed, of which 574 were refusals, 1878 approvals, and 157 were cases removed from the backlog for other reasons, such as abandonment of claims, death of claimants, or consolidation of cases of close relatives. Over 2500 claimants proceeded to the United States with travel affidavits provided by the Consulate General at Hong Kong. (Many "cases" involve several claimants, so that 1800 cases represent more than 2400 claimants.) In

Defendant's Exhibit C—(Continued)

addition, 435 passports were issued to persons who established their eligibility therefore by the means set forth in the Foreign Service Regulations. Since July 1, 1952 the inflow of new claims has decreased to an average of only 25 per month, and the processing of claims at the Consulate General at Hong Kong has proceeded at a rate which has resulted in there being, as of December 1, 1953, only 806 active pending cases at that consular post.

The Department's review of the citizenship claims passed upon at Hong Kong convinced it that a large number of fraudulent claimants were proceeding to the United States with travel affidavits, because of the limited opportunity of the Consulate General to detect and eliminate fraud under the procedures in use since 1949. Accordingly, as of September 1, 1952, the travel-affidavit procedure was abandoned and all claimants to American citizenship are now required to qualify for passports. At the same time, more stringent examination and investigation procedures were authorized, including the blood-typing of claimants and their alleged parents.

The more detailed examination and investigation of claims, and the incidence of court actions requiring work on applications for certificates of identity under Section 503 of the Nationality Act of 1940, have slowed down the rate of processing claims to some extent. Nevertheless, during the period from July 1, 1952 to date, some 2000 claims have been processed. The backlog of pending claims was 806

Defendant's Exhibit C—(Continued)

as of December 1, 1953, and all these claims are in some stage of processing. About 300 of these pending claims were initiated in 1953, so it will be observed that only about 500 pending claims are over a year old.

It must be emphasized that all cases which have been pending for more than six months are cases in which the identity of the claimants has not been established by adequate documentary evidence or by satisfactory testimony. Claims which are supported by adequate evidence of identity and citizenship are completed within a short time.

In connection with complaints regarding delay in processing citizenship claims at Hong Kong, it may be pointed out that such delay is fundamentally caused by the fact that persons of Chinese origin who present their citizenship claims at that post do not, in the vast majority of cases, present evidence of their identity such as claimants at virtually all other consular offices in the world are able to submit and do submit upon request. In addition, the complainants have not taken into consideration two further controlling factors, time and space.

Experience has shown that no more than two cases a day can be scheduled per examiner. This allows a maximum of four hours per case for the execution of the passport application and accompanying affidavit, the evaluation of the evidence submitted, the interview with the applicant and his identifying witness or witnesses through an interpreter, and the preparation of the transcript of

Defendant's Exhibit C—(Continued)

testimony and written report by the examiner. While some of these operations may be performed simultaneously and others need not be performed at the time of the interrogation of the applicant, a minimum average time of four hours is, nevertheless, required per case. With approximately 20 working days per month and an average of eight examiners, a theoretical maximum of 3840 cases a year could be scheduled for interviews. Actually, this figure was not attained during 1951 when every effort was bent toward maximum scheduling and minimum examination. Applicants fail to appear for their appointments, or appear without witnesses, necessitating rescheduling at a later date, and many cases cannot be completed within the theoretical 4-hour limit. Nevertheless, 2986 cases were completed in 1951, representing at least 3200 interviews.

If the Department were in command of unlimited funds, which it is not, and if qualified citizenship examiners were available in unlimited quantity, which they are not, it would still be impossible to solve the processing problem by the apparently easy method of doubling, tripling, or quadrupling the number of examiners, since space is not unlimited in Hong Kong, and such space as is available is not elastic. Each case requires, in addition to a proportion of the time of file clerks, correspondence clerks, etc., the services of one citizenship examiner, one interpreter (since neither applicants nor witnesses speak or understand English as a rule), and

Defendant's Exhibit C—(Continued)

one typist. Each applicant generally has at least one identifying witness, and is encouraged to present all available relatives, so that his identify as a member of the family group may be established, if possible. Accordingly, for each case handled, space must be provided for a minimum of five persons. With eight examiners on duty, space for a minimum of 40 persons must be provided. As a matter of fact, during 1951, the two Departmental representatives observed at Hong Kong that space for 100 to 150 persons besides the citizenship staff must be provided for daily. Doubling, tripling or quadrupling the staff of examiners would, obviously, require the virtual doubling, tripling, or quadrupling of the necessary space, and such extensive space is simply not available.

Many changes in the procedure for processing citizenship claims at the American Consulate General at Hong Kong have been made since 1949, as experience has dictated, but in its general outlines the procedure has conformed to that now in effect.

The procedure for endeavoring to determine the identity of passport applicants at Hong Kong is no different in general from that employed at any other consular post when persons who have not previously been documented as American nationals or even asserted a claim to American nationality at any American diplomatic or consular establishment abroad apply for passports or for registration as American nationals. An American consular of-

Defendant's Exhibit C—(Continued)

ficer, acting for the Department, may use any reasonable means consistent with the Department's instructions to assure himself and the Department of the identity of a person who applies for documentation as an American national. The nature of the evidence of identity asked for by the Consulate General at Hong Kong may differ in some respects from that demanded at other consular posts where different circumstances prevail. For example, most applicants at Hong Kong are comparatively recent arrivals in the Colony, having come there since 1949 or 1950 from Communist-held China. They are unable or unwilling to submit the usual formal evidence of identity available to applicants elsewhere in the world. Such documents of Chinese origin as are available, purporting to attest to their identity, are not susceptible of verification as to authenticity or as to the accuracy of the information set forth, since the mainland of China is "closed" to the United States under present conditions. As indicated previously, it is impossible to check in the area from which the applicants purport to come, statements as to residence, family circumstances, actual names of applicants, or the validity of such documents as are presented. In addition, formal, official vital statistics records (birth, marriage, divorce, and death records), such as are normally kept in other countries, are lacking in China. Consequently, informal and unofficial evidence of such matters must be obtained, if possible. Persons whose claims are fraudulent, as previously stated, take ad-

Defendant's Exhibit C—(Continued)

vantage of this situation and furnish as a little "evidence" and as little information about themselves as possible, thus hampering such investigation as may be feasible at Hong Kong and elsewhere. It may be stated that the Consulate General at Hong Kong obtains information from the records of the Immigration and Naturalization Service as indicated below, a procedure not usual at other consular posts, since the Immigration and Naturalization Service has records which are applicable in the cases presented at Hong Kong, and this is not true in general in regard to citizenship claims arising elsewhere in the world.

As soon as practicable after a citizenship claim is brought to the notice of the Consulate General by any means whatever, the claimant is called in to execute a passport application and an appropriate affidavit in connection therewith. If evidence of identity and citizenship such as has been found to be satisfactory in connection with the type of case presented at Hong Kong is not presented, the applicant is advised to obtain such evidence from his alleged father or other relative in the United States. In addition, the Consulate General endeavors to communicate at the earliest practicable date with the alleged father or other relative of the claimant in the United States who has sponsored the presentation of the claim, to ascertain whether such evidence can be submitted. If an American citizen, identifiable as such, is available to serve as an identifying witness, such person is permitted to

Defendant's Exhibit C—(Continued)

execute the affidavit of identifying witness appearing on the passport application.

Coincidentally with the execution of the passport application if sufficient information is available, or as soon as practicable thereafter, a report is requested from the appropriate office of the Immigration and Naturalization Service as to the contents of the records of that Service regarding the alleged parent's entry into and departure from the United States, the children claimed by him, and documents which may have been issued by the Immigration and Naturalization Service; and transcripts of testimony previously taken at hearings held by the Immigration and Naturalization Service in the United States are requested, in order that this information may be available at the time the applicant is scheduled for an interview with his available witnesses at Hong Kong.

Cases in which the initial examiner believes that investigation at Hong Kong or in the United States prior to the interview is essential are referred for investigation.

As soon as practicable, the applicant is scheduled for an interview with his available witnesses, unless such interview is considered unnecessary in view of the nature of the documentary evidence submitted. It is not possible to schedule immediate interviews in all cases, and it is undesirable in most cases that immediate interviews be scheduled, since the necessary investigation requires time for its completion. Occasionally, the results of the interview indicate

Defendant's Exhibit C—(Continued)

the necessity or the desirability of further investigation, which is then conducted. At the opportune time, the blood types of the applicants and the alleged brothers, sisters, and parents who may be available are ascertained as a routine procedure, with the consent of the persons involved.

When an applicant's claim to American citizenship has been investigated at Hong Kong as thoroughly as possible and the applicant has been interviewed to the extent necessary with such witnesses as may be available, his case is presented by the Consulate General to the Department for a decision as to whether a passport may be issued to him for his proposed travel to the United States.

[Department of State certification of true copy attached.]

[Endorsed]: No. 14947. United States Court of Appeals for the Ninth Circuit. John Foster Dulles, as Secretary of State, Appellant, vs. Tam Suey Jin, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: November 17, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14947

JOHN FOSTER DULLES, as United States Sec-
retary of State, Appellant,

vs.

TAM SUEY JIN, Appellee.

APPELLANT'S STATEMENT OF POINTS

The appellant hereby designates the following Points on Appeal in the above entitled matter:

(1) The District Court was without jurisdiction to declare appellee a national or citizen of the United States, since appellee was not denied a right or privilege as a national of the United States upon the ground that she was not a national of the United States prior to the repeal of Section 503 of the Nationality Act of 1940.

(2) The District Court erred in denying appellant's Motion to Dismiss for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted.

(3) The District Court erred in its Finding of Fact Number IV.

Dated: This 28th day of November, 1955.

LAUGHLIN E. WATERS,
United States Attorney

MAX F. DEUTZ,
Assistant U. S. Attorney, Chief
of Civil Division

/s/ JAMES R. DOOLEY,
Assistant U. S. Attorney,
Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 29, 1955. Paul P.
O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD

Appellant hereby designates the following Record
to be printed in the above entitled matter:

1. Petition to Establish Nationality of the United States;
2. Answer;
3. Motion to Dismiss;
4. Affidavit of James R. Dooley (Exhibit A to Motion to Dismiss);
5. Minutes of the Court for June 2, 1955;
6. Findings of Fact and Conclusions of Law;
7. Judgment Determining American Citizenship;
8. Notice of Appeal;
9. Stipulation Regarding Exhibits;
10. Appellant's Designation of Record to be Printed;
11. Appellant's Statement of Points on Appeal;

12. Plaintiff's Exhibit 1;
13. Defendant's Exhibit C;
14. The following portions of the typewritten transcript: Page 6 lines 8-25; page 7 lines 1-2; page 73 lines 24-25; page 74 lines 1-25; page 75 lines 1-22.

Counsel for the parties have stipulated, subject to the approval of the Court, that the exhibits received in evidence might be considered in their original form and need not be printed; however, appellant has designated for printing plaintiff's Exhibit 1 and Defendant's Exhibit C, since appellant's brief will frequently refer to these two exhibits.

Dated: This 28th day of November, 1955.

LAUGHLIN E. WATERS,
United States Attorney

MAX F. DEUTZ,
Assistant U. S. Attorney, Chief
of Civil Division

/s/ JAMES R. DOOLEY,
Assistant U. S. Attorney,
Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 29, 1955. Paul P. O'Brien, Clerk.

No. 14947.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, as United States Secretary of
State,

Appellant,

vs.

TAM SUEY JIN,

Appellee.

APPELLANT'S OPENING BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,
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FILED

MAY 15 1956

PAUL R. O'BRIEN, CLERK

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No. 14947.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, as United States Secretary of
State,

Appellant,

vs.

TAM SUEY JIN,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

Appellee, plaintiff in the Court below, brought action in the District Court, seeking to be declared a national of the United States [R. 3-5].¹ Jurisdiction was invoked pursuant to Section 503 of the Nationality Act of 1940, 54 Stat. 1171-1172, 8 U. S. C. A., Sec. 903 [R. 5]. Appellant contends that the Court below was without jurisdiction of the subject matter, since appellee had not been denied a right or privilege as a national of the United States upon the ground that she was not such a national at the time her Complaint was filed on December 22, 1952 [R. 5], or before the repeal of Section 503 of the Nationality Act of 1940.²

Since the judgment of the District Court [R. 16-17] was a final decision, this Court has jurisdiction of an

¹"R" refers to the printed Transcript of Record.

²Section 503 was repealed by Section 403(a) (42) of the Immigration and Nationality Act of 1952, 66 Stat. 280, effective December 24, 1952 (See, Sec. 407 of the Immigration and Nationality Act of 1952, 66 Stat. 281).

appeal from that decision pursuant to 28 United States Code, Section 1291. However, the jurisdiction of this Court ends if it finds that the District Court was without jurisdiction of the subject matter (*United States v. Corrick*, 298 U. S. 435, 440 (1936)).

Statement of the Case.

On December 22, 1952 appellee filed a Complaint in the District Court under Section 503 of the Nationality Act of 1940, seeking a judgment declaring her to be a national of the United States [R. 3-5]. She alleged that she was born in China on April 28, 1941 of legally married parents [R. 3]; that her alleged father was a citizen of the United States at the time of her birth [R. 3]; that he had resided in the United States since May 17, 1923 [R. 3-4]; that she had "heretofore" filed at the American Consulate General in Hong Kong for an American passport or other travel document to come to the United States to reside at her father's residence in California [R. 4]; that the Consulate General "has refused to issue to plaintiff the passport applied for" [R. 4]; and that the appellant had denied her the privilege of entering the United States as a citizen on the ground that she was not a United States national [R. 5].

During trial³ appellant moved to dismiss appellee's action pursuant to Rule 12(b)(1) and (6) and Rule 12(h), Federal Rules of Civil Procedure, on the grounds that the court lacked jurisdiction over the subject matter of the action and that the Complaint failed to state a claim

³The case was consolidated for trial with *Tam Hem Fook v. Dulles*, No. 14,293-HW Civil and *Tam Hem Wing v. Dulles*, No. 14895-HW Civil [R. 11]; however, these two cases are not involved in the present appeal.

upon which relief could be granted [R. 8-11, 13, 21-23]. The certified passport file relating to appellee [R. 23-57], which had previously been received in evidence as Plaintiff's Exhibit 1 [R. 12, 21] supported this Motion [R. 9, 10-11]. This file disclosed that appellee's passport application was executed on May 6, 1952 [R. 28]; that on July 13, 1954 an American Vice Consul recommended that the application be denied [R. 29]; that another vice consul concurred in this recommendation on July 15, 1954 [R. 29]; and that the Department of State disapproved the application on September 23, 1954 [R. 28].

Also received in support of appellant's motion as Defendant's Exhibit C [R. 21, 22] was an authenticated Statement Regarding the Processing of Passport Applications at the American Consulate General in Hong Kong [R. 58-69]. This statement disclosed, among other things, that with the closing of the American Consulate at Canton in 1949, a heavy load of citizenship cases was transferred to Hong Kong [R. 58]; that applications later descended on the Consulate General at Hong Kong at the rate of 150 per month [R. 59, 61]; that lack of funds, personnel, and office space limited the number of applications which could be processed [R. 64-65]; that as of September 1, 1952, more stringent examination and investigation procedures were authorized, since the State Department's review of citizenship claims passed upon at Hong Kong convinced it that a large number of fraudulent claimants were proceeding to the United States [R. 62]; and that the more detailed examination and investigation of claims and the incidence of court actions requiring work on applications for certificates of identity under Section 503 slowed down the rate of processing claims [R. 62].

The District Court denied appellant's motion to dismiss on the ground that the delay of approximately seven and one-half months in acting on appellee's passport application prior to the time her suit was brought was unreasonable and a denial of appellee's rights and privileges as a national and citizen of the United States [R. 13, 21-23; Finding of Fact IV, R. 15]. Judgment was entered declaring appellee to be a national and citizen of the United States of America [R. 16-17].

Statement of Points.

I.

The District Court was without jurisdiction to declare appellee a national or citizen of the United States, since appellee was not denied a right or privilege as a national of the United States upon the ground that she was not a national of the United States prior to the repeal of Section 503 of the Nationality Act of 1940.

II.

The District Court erred in denying appellant's Motion to Dismiss for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted.

III.

The District Court erred in its Finding of Fact IV.

Questions Presented.

1. Do the facts establish the jurisdictional requisite for an action under Section 503 of denial on the ground that appellee is not a United States national?

2. Does the savings clause of the 1952 Act permit a suit as to which there was no jurisdiction when Section 503 was repealed to be jurisdictionally revived by virtue of an express administrative denial of the claimed right after the new Act took effect?

Statutes Involved.

Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U. S. C. A., Section 903, provides in pertinent part:

“Sec. 503. If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States * * *.”

Section 405(a) of the Immigration and Nationality Act of 1952, 66 Stat. 280, 8 U. S. C. A., note following Section 1101, provides in pertinent part:

“Sec. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed * * * to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, [*sic*] conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act, are unless otherwise specifically provided therein, hereby continued in force and effect * * *.”

ARGUMENT.

I.

Summary.

In order to maintain her action under Section 503 of the Nationality Act of 1940, appellee was required to prove as a jurisdictional requisite that at the time her Complaint was filed she had been denied a right or privilege as a national of the United States upon the ground that she was not a national of the United States. Appellee had not been denied such a right or privilege, either actually or constructively when her action was instituted. There was no denial in fact, since the State Department did not disapprove appellee's passport application until September 23, 1954. Nor was there an implied denial. The finding of the District Court to the contrary, although nominally a finding of fact, was in substance a conclusion of law, and this Court is not bound by the rule that findings shall not be set aside unless clearly erroneous. Nevertheless, in view of the statutory duty imposed upon appellant to make an administrative determination of appellee's nationality prior to issuing a passport; the scant evidence submitted by appellant to aid in such determination; the inability, due to appellee's place of birth and prior residence, to verify her nationality through official sources; and the congestion of the administrative calendar at the American Consulate at Hong Kong, caused by a deluge of similar applications; the finding of the District Court that a delay of approximately 7½ months in passing upon appellee's passport application was unreasonable was clearly erroneous.

Nor did the savings clause contained in the Immigration and Nationality Act of 1952 permit appellee's suit

to be jurisdictionally revived by virtue of the denial of her passport application after the new Act took effect. The language in *Fujii v. Dulles*, 224 F. 2d 906 (C. A. 9, 1955), to the contrary was not essential to a decision of that case, and this Court may regard the issue as not having been previously adjudicated. The “right” to institute an action under Section 503, being solely procedural in nature, does not come within the purview of general phrases contained in the savings clause, such as “right in process of acquisition.” Moreover, an application of the latter phrase to actions under Section 503 runs counter to the manifest intent of Congress, which expressed dissatisfaction with the operation of the statute, and meant to strictly limit its operation by setting up a new procedure for determining claims to citizenship. Even if the savings clause in the 1952 Act could be construed to encompass a “right” to bring suit under Section 503, appellee’s action would not be revived, since jurisdiction depends upon the state of things existing at the time suit is brought.

II.

The Facts Do Not Establish the Jurisdictional Requirement for an Action Under Section 503 of Denial on the Ground That Appellee Is Not a United States National.

A. Jurisdictional Requisites for an Action Under Section 503.

In *Dulles v. Lee Gnan Lung*, 212 F. 2d 73 (C. A. 9, 1954), this Court laid down the jurisdictional requirements for an action under Section 503 of the Nationality Act of 1940 as follows (p. 75):

“Section 503 of the Nationality Act of 1940, 8 U. S. C. A. §903, did not give any court jurisdic-

tion of any action other than an action instituted by a person *who had claimed a right or privilege as a national of the United States and had been denied such right or privilege by a Department or agency, or executive official thereof, upon the ground that he was not a national of the United States.*" (Emphasis added.)

There are no presumptions in favor of the jurisdiction of the courts of the United States (*Grace v. American Central Ins. Co.*, 109 U. S. 278 (1883); *Ex parte Smith*, 94 U. S. 455 (1876)). Consequently, the requisites for jurisdiction as enunciated in *Lee Gnan Lung* must not only be alleged in the pleadings (*Elizarraraz v. Brownell*, 217 F. 2d 829 (C. A. 9, 1954); *Clark v. Inouye*, 175 F. 2d 740 (C. A. 9, 1949)); but, if challenged in any appropriate manner, must be supported by competent proof (*McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178 (1936); *Celite Corporation v. Dicalite Co.*, 96 F. 2d 242, 249 (C. C. A. 9, 1938)).

It was therefore incumbent upon appellee to prove that at the time her complaint was filed, she had been denied a right or privilege as a national of the United States upon the ground that she was not a national of the United States.

B. There Was No Express Denial.

Clearly, there was no express denial of appellee's passport application, either at the time her action was instituted on December 22, 1952 [R. 5] or when Section 503 of the Nationality Act of 1940 was repealed on December 24, 1952. The passport file relating to appellee discloses that after December 24, 1952, testimony was taken [R. 33-40], blood tests and clinical examinations were con-

ducted [R. 42-49], and data was obtained from the Immigration and Naturalization Service in the United States [R. 50-54] in an effort to verify appellee's claimed relationship. This file also shows that on July 13, 1954, an American Vice Consul recommended that appellee's passport application be denied [R. 29]; that another Vice Consul concurred in this recommendation on July 15, 1954 [R. 29], and that the application was disapproved by the Department of State on September 23, 1954 [R. 28]. Thus, there was no express denial of appellee's passport application until September 23, 1954.

C. There Was No Implied Denial.

The District Court did not find an express denial, but assumed jurisdiction on the ground that the delay in acting upon appellee's passport application prior to the time her action was filed was unreasonable and "a denial of plaintiff's rights and privileges as a national and citizen of the United States" [Finding of Fact IV, R. 15]. This finding, although nominally a finding of fact, is in substance a conclusion of law; and this Court is not bound by the rule that findings shall not be set aside unless clearly erroneous (Rule 52(a), Federal Rules of Civil Procedure), but is free to draw its own conclusions (*Stevenot v. Norberg*, 210 F. 2d 615, 619 (C. A. 9, 1954); *Plomb Tool Co. v. Sanger*, 193 F. 2d 260, 264 (C. A. 9, 1952), cert. den., 343 U. S. 919; *Brown v. Cowden Livestock Co.*, 187 F. 2d 1015, 1017-1018).

Appellees' passport application was executed on May 6, 1952 [R. 25] and her complaint was filed on December 22, 1952 [R. 5]. Thus, the delay which the District Court found to be unreasonable amounted to only 7 months and 17 days. Even if Rule 52(a) were applicable,

in view of the statutory duty imposed upon appellant to make an administrative determination of appellee's nationality prior to issuing a passport; the scant evidence submitted by appellee to aid in such determination; the inability, due to appellee's place of birth and prior residence, to verify her nationality through official sources; and the congestion of the administrative calendar at the American Consulate at Hong Kong, caused by a deluge of similar applications; the finding of the District Court that a delay of only 7½ months in passing upon appellee's passport application was unreasonable, is clearly erroneous.

The authority to issue passports has been conferred by statute upon the Secretary of State under such rules as might be prescribed by the President (Sec. 1 of the Act of July 3, 1926, 44 Stat. 887, 22 U. S. C. A., Sec. 211a); and Congress has prohibited the issuance of passports to persons other than those owing allegiance to the United States (Sec. 4076, Revised Statutes of the United States, as amended by the Act of June 14, 1902, 32 Stat. 386, 22 U. S. C. A., Sec. 212).⁴ By executive order, the Secretary of State is empowered to "require such additional evidence of citizenship as in his judgment may be necessary to establish the citizenship of an applicant for a passport" (Ex. Order 7856, 22 C. F. R., Sec. 51.65).⁵

The statutes referred to above manifest a Congressional intent that an administrative determination of United

⁴Of course "alien passports" may be issued (Act of Mar. 2, 1921, 41 Stat. 1217, 22 U. S. C. A., Sec. 227); however, appellee did not apply for a passport as an alien, but as a citizen [R. 23].

⁵Ex. Order 8820, 22 C. F. R. 107.3, authorizes officers of the Foreign Service to issue passports to American nationals pursuant to such provisions of Ex. Order 7856 as may be applicable to the issuance of passports abroad.

States nationality and/or citizenship should precede the issuance of a passport, since granting of passports to persons other than those owing allegiance to the United States is prohibited. Thus, when appellee filed her application for a passport as a citizen, she did not thereby acquire an immediate “right” to the issuance of a passport; nor did she acquire an immediate right to a determination of her claim to citizenship. She was only entitled to have her claim processed in accordance with normal administrative procedures, considering all the facts and circumstances of the case.

Appellee alleged birth on the mainland of China on April 28, 1941 [R. 3], where she had lived from the date of her birth until March 16, 1952, when she came to Hong Kong [R. 26]. She did not submit a birth certificate or other official documentary evidence in support of her application, as is normally available in other countries [R. 66]; nor did she submit any old letters, family photographs, or other documents attesting to the genuineness of her claimed relationship. The only evidence submitted by appellee was an affidavit of her alleged father, Tam (Hom) Tong Gong [R. 54-57]. Because the mainland of China was “closed” to the United States at the time appellee’s passport application was filed, it was impossible to verify her name, place of birth, places of residence, and family history from official sources [R. 59-60]. It was thus necessary for the Consul General to attempt to obtain and evaluate secondary evidence of appellee’s citizenship.

Nor was appellee entitled to priority in the processing of her application, since a large number of similar applications had been filed. Defendant’s Exhibit C, an authenticated Statement Regarding the Processing of Pass-

port Applications at the American Consulate General in Hong Kong [R. 58-69], discloses that with the closing of the American Consulate General at Canton in 1949, a heavy load of citizenship cases was transferred to Hong Kong [R. 58]; that a deluge of applications later descended on the Consulate General at Hong Kong at the rate of 150 per month [R. 59, 61]; that lack of funds, personnel, and office space limited the number of applications which could be processed [R. 64-65]; that as of September 1, 1952, more stringent examination and investigation procedures were authorized, including the blood-typing of claimants and their alleged parents, since the State Department's review of the citizenship claims passed upon at Hong Kong convinced it that a large number of fraudulent claimants were proceeding to the United States [R. 62]; and that the more detailed examination and investigation of claims and the incidence of court actions requiring work on applications for certificates of identity under Section 503 of the Nationality Act of 1940, slowed down the rate of processing claims [R. 62].

In view of the foregoing, it is submitted that the delay of only seven and one-half months here involved was not unreasonable, and that the conclusion of the District Court to the contrary was clearly erroneous. The decisions which have found an implied denial from delay involved periods of substantially greater length. For example, in *Chin Chuck Ming v. Dulles*, 225 F. 2d 849 (C. A. 9, 1955), an affidavit-application⁶ for passport was filed

⁶In the present case appellee filed an affidavit of her alleged father. However, this affidavit, although executed on November 12, 1951 [R. 57], was not filed with the American Consulate at Hong Kong until May 5, 1952 [R. 54—See Stamp], one day before her passport application was executed. Even if this affidavit is considered as an application, it would add only one day to the period of delay.

with the American Consulate General at Hong Kong on September 6, 1951, and a period of 15 months and 16 days elapsed between the date of such filing and the institution of court action. And in *Wong Ark Kit v. Dulles*, 127 Fed. Supp. 871 (D. Mass., 1955), a period of almost three years elapsed between the date an affidavit was executed by plaintiff's alleged father and the date suit was brought. These decisions not only lack persuasive weight as applied to the facts of the case at bar, but emphasize the fact that a delay of only 7½ months was not unreasonable.

III.

The Savings Clause of the 1952 Act Does Not Permit a Suit as to Which There Was No Jurisdiction When Section 503 Was Repealed to Be Jurisdictionally Revived by Virtue of an Express Administrative Denial of the Claimed Right After the New Act Took Effect.

A. Preliminary.

As has previously been shown, appellee had not been denied a right or privilege as a national of the United States upon the grounds that she was not such a national, either actually or constructively, when her suit was brought or when Section 503 was repealed. However, her application for passport was expressly denied by the Secretary of State on September 23, 1954. The issue is thus presented as to whether the savings clause contained in the Immigration and Nationality Act of 1952 permitted her suit to be jurisdictionally revived by virtue of the express administrative denial of the claimed right after the new Act took effect. Appellant submits that it did not.

In *Fujii v. Dulles*, 224 F. 2d 906 (C. A. 9, 1955), this Court used language to the effect that where suit was instituted before the repeal of Section 503, the savings clause of the 1952 Act preserved the right to maintain such suit, if an application (for registration as a citizen) was filed before the repeal of the 1940 law, even though such application was not denied until after that time. Judge Denman declared (pp. 907-908):

“* * * The saving clause of §405(a) of the Immigration and Nationality Act of 1952, 8 U. S. C. A., §1101 note, provides that it shall not be ‘construed to affect’ a proceeding under §903 such as is Fujii’s here.

Speaking of an amendment made in Congress to §405(a), the Supreme Court states in *United States v. Menasche*, 348 U. S. 528, 75 S. Ct. 513, 518, 99 L. Ed., that ‘The change in the section was designed to extend a savings clause already broadly drawn, and embodies, we believe, congressional acceptance of the principle that the *statutory status quo was to continue even as to rights not fully matured.*’ (Emphasis supplied.) Fujii had the right to litigate his case before the district court though his right thereto had not fully matured on December 24, 1952.”

The above quoted language from *Fujii* was not essential to a decision of that case. Fujii’s suit had been brought on December 16, 1952. His amended complaint alleged that a certificate of loss of nationality had been approved by the Secretary of State on December 18, 1952, and

the District Court in its opinion so found.⁷ However, an affidavit by an Assistant United States Attorney had stated that the certificate of loss had not been approved by the Secretary of State until March 18, 1953, and Judge Denman "*for the purposes of [his] opinion*" (224 F. 2d 907—emphasis added), assumed that the approval had occurred on the latter date. Since the District Court had found that the approval had occurred on December 18, 1952, and since in *Suda v. Dulles*, 224 F. 2d 908 (C. A. 9, 1955), this Court held that such approval constituted a sufficient denial, the application of the savings clause in *Fujii* would seem unnecessary.⁸ This court may therefore treat the issue here involved as not having been previously adjudicated.

The savings clause in the 1952 Act did not jurisdictionally revive appellee's suit because the "right" to institute an action under Section 503 does not come within the purview of general phrases contained in the savings clause, such as "right in process of acquisition," and because the savings clause of the 1952 Act, even if construed to encompass such a "right," cannot revive appellee's action, since jurisdiction depends upon the state of things existing at the time suit is brought.

⁷The District Court said (122 Fed. Supp. at p. 262): ". . . on December 18, 1952, the State Department sent a telegram to the American Consul at Kobe approving a number of Certificates executed by him, one of which was the plaintiff's."

⁸The Department of State has advised that the approval of Fujii's certificate of loss was contained in the same message as the approval of Suda's.

B. Procedural Remedies Were Not Preserved by the Savings Clause.

In determining the effect of a general savings clause upon repealed statutes, the courts have been careful to distinguish between statutes, such as Section 503, which create mere procedural "rights" or remedies, and statutes which create substantive rights and liabilities. The latter type of statute is preserved by a general savings clause, while the former is not (*Bridges v. United States*, 346 U. S. 209, 224-227 (1953); *De La Rama S.S. Co. v. United States*, 344 U. S. 386 (1952); *Hallowell v. Commons*, 239 U. S. 506 (1916); *Aure v. United States*, 225 F. 2d 88, 90 (C. A. 9, 1955); *United States v. Obermeir*, 186 F. 2d 243, 250-256 (C. A. 2, 1952), cert. den. 340 U. S. 951; *Matsuo v. Dulles*, 133 Fed. Supp. 711 (S. D. Calif., 1955)).

In *Aure v. United States*, *supra*, this Court was confronted with the issue of whether a right to naturalization existed under the 1940 Act was preserved by the savings clause of the 1952 Act, so as to enable such right to be exercised after the effective date of the latter statute. Following a careful analysis of the recent decision of the Supreme Court in *United States v. Menasche*, 348 U. S. 528 (1955), this Court observed (p. 90):

"* * * The real test is whether the 'right' which the alien seeks to have preserved by the savings clause is a substantive right, and in this regard we are mindful of the distinction between substantive rights and procedural remedies. * * *" (Emphasis added.)

And in *De La Rama S.S. Co. v. United States*, *supra*, the Supreme Court had occasion to distinguish between

the effect of a general savings clause upon those statutes solely jurisdictional in scope and its effect upon statutes in which substantive rights are fused with procedural remedies. In that case a war risk policy had been issued under the War Risk Insurance Act of 1940, as amended, which statute authorized suit on the policy in a Federal District Court. The Court held that the substantive right to recover on the policy and the forum in which suit was to be brought were "fused components of the expression of a policy," and that a general savings clause preserved the right to maintain suit in the District Court. In so doing, however, the Court was careful to recognize the following distinction (p. 390):

"The Government rightly points to the difference between the repeal of *statutes solely jurisdictional in their scope and the repeal of statutes which create rights and also prescribe how the rights are to be vindicated*. In the latter statutes, 'substantive' and 'procedural' are not disparate categories; they are fused components of the expression of a policy. When the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits, unless expressly reserved. *Ex parte McCardle*, 7 Wall. 506, is the historic illustration of such a withdrawal of jurisdiction, of which less famous but equally clear examples are *Hallowell v. Commons*, 239 U. S. 506, and *Bruner v. United States*, 343 U. S. 112. *If the aim is to destroy a tribunal or to take away cases from it, there is no basis for finding saving exceptions unless they are made explicit.* * * *" (Emphasis added.)

Section 503 of the Nationality Act of 1940 was "solely jurisdictional" in its scope (See, *Hallowell v. Commons*, *supra*). It did not provide a means of acquiring nation-

ality,⁹ but a forum for determining its existence. A judgment under Section 503 does not confer nationality, nor does it take nationality away, but merely adjudicates an already existing status (See, *Acheson v. Fujiko Furusho*, 212 F. 2d 284, 292, 296 (C. A. 9, 1954)). Thus, the reference in *United States v. Menasche*, 348 U. S. 528 (1955) to “rights not fully matured” has no application to the “right” to institute an action under Section 503, but refers to substantive rights and liabilities. Section 503 created merely a procedural remedy which was not preserved by the savings clause (*Matsuo v. Dulles, supra*; *Yamamoto v. Dulles*, 16 F. R. D. 195, 198 (D. Hawaii, 1954); *D’Argento v. Dulles*, 113 Fed. Supp. 933 (D. C. Dist of Col., 1953); *Ng Gwong Dung v Brownell*, 112 Fed. Supp. 673, 674 (S. D. N. Y., 1953); *Avina v. Brownell*, 112 Fed. Supp. 15, 19-20 (S. D. Texas, 1952)).

C. Congress Intended to Cut Off the Right to Institute an Action Under Section 503.

The language of this Court in *Fujii v. Dulles, supra*, indicates that the statutory *status quo* was to continue as to Fujii’s “right” to institute an action under Section 503 of the Nationality Act of 1940, even though such right had not fully matured on December 24, 1952. The far-reaching implications of this reasoning is illustrated by *Wong Kay Suey v. Brownell*, 227 F. 2d 41 (C. A. Dist.

⁹*United States v. Menasche*, 348 U. S. 528 (1955) and *Bertoldi v. McGrath*, 178 F. 2d 977 (C. A. Dist. Col., 1949), afford examples of a general savings clause being applied to preserve a substantive right of citizenship in the process of being acquired under prior law.

Col., 1955), cert. den. 24 L. W. 3225.¹⁰ In the latter case the Court applied the savings clause to enable one who had been denied a right or privilege before repeal of Section 503 to institute an action under that statute during 1954, long after the effective date of the repeal.¹¹ The language in both *Fujii* and *Suey* assumes, appellant believes erroneously, that the "right" to institute an action under Section 503 comes within the purview of the general phrase contained in the savings clause of the 1952 Act: "right in process of acquisition"; and the language in both would seem to be contrary to the manifest intent of Congress.

The legislative history of the 1952 Act discloses that Congress intended to cut off the right to bring a declaratory judgment action under Section 503. One of the problems which had arisen under Section 503 had been the number of cases where persons, largely in derivative citizenship cases, had employed this statute solely for the

¹⁰No inference, of course, can be drawn from the denial by the Supreme Court of certiorari (*Brown v. Allen*, 344 U. S. 443, 489-497 (1953).) This is particularly true here because in the District of Columbia, where the *Suey* case arose, it was possible to institute an action for declaration of nationality even before a specific statute was enacted for that purpose (*Perkins v. Elg*, 307 U. S. 325 (1939); *Matsuo v. Dulles*, 133 Fed. Supp. 711, 713 (S. D. Cal., 1955)).

¹¹The State Department has advised that during the five years from 1948 to 1952, 37,518 certificates of loss of nationality were approved pursuant to Section 501 of the Nationality Act of 1940, 54 Stat. 1137, 8 U. S. C. A., Sec. 901. Under the reasoning of *Fujii* and *Suey*, the door is now open to all those citizenship claimants (not resident in this country) who have not previously done so to institute suits for declaratory judgment under former Section 503. In addition, persons abroad claiming nationality as the foreign born children of American parents, who applied for documentation before December 24, 1952 could institute such actions. While the exact number of the latter type of cases is not known, it is believed to be considerable.

purpose of gaining entry into the United States. In the broad study of the working of the existing immigration and nationality laws, represented by Senate Report 1515, 81st Cong., 2d Sess., which culminated in the 1952 Act, the following observation is made (p. 777):

“In spite of the definite restrictions on the use and application of section 503 to bona fide cases, the subcommittee finds that the section has been subject to broad interpretation, and that *it has been used, in a considerable number of cases, to gain entry into the United States where no such right existed.* The subcommittee also feels that the statute should be limited as to time within which such an action may be brought. The subcommittee therefore recommends that the provisions of section 503 as set out in the proposed bill be modified to limit the privilege to persons who are in the United States, and that any such action shall be brought within 5 years after the finding that the person is not a national of the United States.” (Emphasis added.)

The hearings on the McCarran-Walter bill (which became the 1952 Act) indicate that the concern was with “the fraud and the derivative citizenship cases,” and with the fact that aliens not entitled to admission were gaining physical entry into the United States and disappearing into the general population. (Joint Hearings before the Subcommittees of the Committees on the Judiciary, 82nd Cong., 1st Sess. on S. 716, H. R. 2379, and H. R. 2816, p. 443, see also pp. 108-109).

Congress enacted Section 360 of the Immigration and Nationality Act of 1952, 66 Stat. 273, 8 U. S. C. A., Sec. 1503, which sharply restricted the circumstances under which an action for declaration of nationality could be instituted. The successor statute permits declaratory

judgments of American nationality only where a "person who is within the United States" is denied a right or privilege as an American national on the ground of alienage, and *precludes such action where the issue of nationality arose "by reason of, or in connection with any exclusion proceeding under the provisions of this or any other act" or "is in issue in any such exclusion proceeding."* (*Nevarez v. Brownell*, 218 F. 2d 575 (C. A. 5, 1955); *Matsuo v. Dulles*, 133 Fed. Supp. 711, 715 (S. D. Cal., 1955); *Gonzalez-Gomez v. Brownell*, 114 Fed. Supp. 660 (S. D. Cal., 1953)). Under the new Act, claimants outside the United States are allowed judicial consideration of their claims only by habeas corpus after they have come to this country on certificates of identity and been denied admission (See, Secs. 360(b) and (c); *Avina v. Brownell*, 112 Fed. Supp. 15 (S. D. Tex., 1952)); and persons who are over sixteen when they apply for such certificates are not eligible to come to this country to have their claims considered unless they have previously been in this country (See, Sec. 360(b)). The enactment of the present Section 360, instead of the alternative suggestion that the pattern of former Section 503 be continued,¹² thus represents a clear Congressional decision to curtail the scope of declaratory judgment review.

In view of the foregoing, it is inconceivable that Congress intended to keep Section 503 in force indefinitely, either for the purpose of instituting new suits (*Wong Kay Suey v. Dulles*, *supra*) or for the purpose of reviving a

¹²The revisions of procedure originated in the Senate bill. The House bill continued the provisions of former Section 503. See S. Rep. 1137, 82nd Cong., 2d Sess., p. 50; H. Rep. 1365, 82nd Cong., 2d Sess., p. 87. The Senate formulation ultimately prevailed.

suit as to which there was no jurisdiction when Section 503 was repealed (language in *Fujii v. Dulles*, *supra*). Instead, it is clear that Congress was dissatisfied with the operation of Section 503, and meant to limit strictly its operation.

It should be emphasized that in repealing Section 503 of the 1940 law and enacting Section 360 of the 1952 Act, Congress was not thereby depriving appellee of citizenship, but was merely changing the manner in which her citizenship should be determined (*Gonzalez-Gomez v. Brownell*, 114 Fed. Supp. 660, 661 (S. D. Cal., 1953)). There is no vested right in procedure which makes it immune to change by Congress *Barber v. Yanish*, 196 F. 2d 53, 54, footnote 1 (C. A. 9, 1952), and cases cited therein; *Avina v. Brownell*, 112 Fed. Supp. 15, 19-20 (S. D. Tex., 1953)); and a change in remedy is generally construed as being immediately applicable (See, *Ex parte Collett*, 337 U. S. 55, 71; *Bruner v. United States*, 343 U. S. 112, 116-117; *United States v. Stromberg*, 227 F. 2d 903 (C. A. 5, 1955)).¹³ Consequently, the doctrine of liberal construction enunciated in *Schneiderman v. United States*, 320 U. S. 118, 122 (1943) should not be permitted to modify the general rule regarding the applicability of a general savings clause to statutes solely procedural in nature, nor to override the manifest intent of Congress. This is particularly true in the case at bar, *since appellee, being under 16 years of age, may yet apply under Section*

¹³In *United States v. Stromberg*, *supra*, the Court held that "liability" to denaturalization on the ground of illegal procurement as provided for in the 1940 law was not preserved by the savings clause of the 1952 Act, and that an amendment charging illegal procurement after the 1952 Act became effective did not relate back to the date of the original complaint which was filed on September 11, 1952.

360(b) of the Immigration and Nationality Act of 1952 for a certificate of identity to come to the United States and have her citizenship administratively determined with a right of judicial review in habeas corpus.

D. The Savings Clause of the 1952 Act, Even if Applicable, Could Not Jurisdictionally Revive Appellee's Suit.

Appellee's suit was instituted on December 22, 1952 [R. 5]. Neither at that time, nor on December 24, 1952 when Section 503 of the Nationality Act of 1940 was repealed, had appellee been denied a right or privilege as a national of the United States upon the grounds that she was not such a national. Consequently, the savings clause of the 1952 Act, even if applicable, could not jurisdictionally revive her suit, since jurisdiction depends upon the state of things existing at the time suit is brought. This principle was recently enunciated in *Yung Ting Yeung v. Dulles*, 229 F. 2d 244 (C. A. 2, 1956), where the court, criticizing *Fujii v. Dulles*, *supra*, remarked (p. 248) :

"[5, 6] In support of this argument plaintiffs cited *Junso Fujii v. Dulles*, 9 Cir., 1955, 224 F. 2d 906. In the *Fujii* case the Court held that the 'saving clause' of the 1952 Act provides that the new Act shall not affect a suit brought under §503 of the 1940 Act prior to December 24, 1952 and that such a suit may therefore be maintained even though there was no denial of a right at the time it was brought. *This ruling over looks the fact that even under the 1940 Act such a suit would have had to be dismissed.* Under §503 the denial of 'a right or privilege as a national' was a prerequisite to jurisdiction in the District Court. *Jurisdiction depends upon the state of things existing at the time suit is brought.* *Minneapolis & St. Louis Railroad Co. v. Peoria & Pekin Union Railway Company*, 1926, 270 U. S. 580, 586,

46 S. Ct. 402, 70 L. Ed. 743. Thus even if §503 had not been repealed by the 1952 Act, 8 U. S. C. A. §1101 *et seq.*, it would be necessary to dismiss the suits unless the plaintiffs could show that they had been denied passports prior to commencement of suit. *The saving clause of the 1952 Act certainly does not give plaintiffs greater rights than they would have had if that Act had not been passed. * * **” (Emphasis added.)

Conclusion.

Wherefore for the reasons set forth above, it is respectfully submitted that the judgment of the District Court should be reversed and the cause remanded, with directions to dismiss appellee’s action for lack of jurisdiction.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, as United States Secretary of
State,

Appellant,

vs.

TAM SUEY JIN,

Appellee.

BRIEF FOR APPELLEE.

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FILED

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No. 14947.

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BRIEF FOR APPELLEE.

Jurisdiction.

This is an appeal from a judgment in favor of plaintiff in an action wherein plaintiff sought to establish her status as a national of the United States. The action was brought pursuant to the provisions of Section 503 of the Nationality Act of 1940 (8 U. S. C. 903) which provides, in part, as follows:

“If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. . . .” (54 Stat. 1171-1172; 8 U. S. C. 903.)

In her Petition to Establish Nationality of the United States Pursuant to Section 903, Title 8, U. S. C. A. [T. R. 3] appellee alleged, in paragraph I thereof, that she was born in China on April 28, 1941; in paragraph II thereof that she is the legitimate daughter of Tam Tong Gong; that said Tam Tong Gong was a citizen of the United States at the time of plaintiff's birth and has lived and resided in the United States since May 17, 1923; that her father, Tam Tong Gong, resides in Los Angeles, California; that she claims residence in Los Angeles, California, the home of her father; that she is a citizen of the United States [T. R. 3-4]; in paragraphs III and IV thereof that she claims the right and privilege as a citizen of the United States

“to enter, stay and remain and reside permanently in the United States as a citizen thereof, but that defendant has denied and continues to deny such rights and privileges to the plaintiff upon the ground that she is not a national of the United States.” [T. R. 4-5].

In paragraph V plaintiff alleged that the action is brought in good faith pursuant to the provisions of Section 903, Title 8, U. S. C. A.

In his answer [T. R. 6] defendant denied, on information and belief, the allegations contained in paragraph I of the complaint; denied that Tam Tong Gong was at any time a citizen of the United States, or that he was admitted to the United States, or that he was admitted to the United States at any time as a citizen by the United States Immigration and Naturalization Service, as alleged in paragraph II of the complaint and denied on information and belief all other allegations contained in said paragraph II; denied each and every allegation contained in paragraphs III, IV and V of the complaint and denied that

plaintiff is, or ever has been, a citizen of the United States, or entitled to any rights or privileges as such [T. R. 7].

The complaint herein was filed on December 22, 1952 [T. R. 5], before the repeal of Section 503 of the Nationality Act of 1940 by Section 403(a)(42) of the Immigration and Nationality Act of 1952, 66 Stat. 280, effective December 24, 1952.

Since the judgment of the District Court [T. R. 16-17] was a final decision, this Court has jurisdiction of an appeal from that decision under the provisions of 28 U. S. C. 1291 and 1294(1).

Statutes Involved.

Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U. S. C. A. Section 903, provides in part, and insofar as is pertinent to this action, as follows:

“If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States”

Statement of the Case.

Appellant's statement of the case is substantially correct. Appellee contends, however, that with respect to appellant's motion to dismiss, the certified passport file [Pltf. Ex. 1] does not support said motion.

ARGUMENT.

I.

The Issues.

Appellant does not challenge the sufficiency of the evidence to support the findings of fact and conclusions of law that plaintiff is a citizen and national of the United States. He is attacking the judgment solely upon jurisdictional grounds, it being his contention that "the facts do not establish the jurisdictional requirements for an action under section 503 of denial on the ground that appellee is not a United States national."

Appellee concedes that in order to maintain her action under Section 503 of the Nationality Act of 1940, it was incumbent upon her to prove as a jurisdictional requisite that at the time her complaint was filed she had been denied a right or privilege as a national of the United States upon the ground that she was not a national of the United States. It is appellee's contention, however, that the allegations necessary for jurisdiction were alleged in the complaint and were proved at the trial of the action.

II.

The District Court Did Not Err in Denying Appellant's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted.

In her complaint plaintiff alleged that she was born on April 28, 1941 in China; that she is the legitimate daughter of a citizen of the United States; that she claims residence in Los Angeles, California, the home of her father; that she claims to be a citizen of the United States and entitled to the rights and privileges of a citizen of the United States; that she had theretofore filed an application for an American passport or other travel document

as a citizen of the United States with the American Consulate General at Hong Kong for the purpose of traveling to the United States to join her father; that the American Consulate General at Hong Kong has refused to issue to plaintiff the passport applied for, thereby denying plaintiff's American citizenship and her rights and privileges as a citizen of the United States; that plaintiff has at all times claimed and now claims the right and privilege as a national of the United States of America to enter, stay and remain and reside permanently in the United States as a citizen thereof, but that the defendant has denied and continues to deny such rights and privileges to the plaintiff upon the ground that she is not a national of the United States. Such allegations are sufficient to give the court jurisdiction to hear and determine the cause. (*Jew May Lune v. Dulles*, 226 F. 2d 796.)

In *Jew May Lune v. Dulles*, *supra*, the court stated, at page 798:

"There were sufficient 'facts' set up in the petition to give the court jurisdiction to hear and determine the cause. It was alleged that her rights were denied upon the ground that she was not a national. Under federal forms of pleading, this is sufficient, and, besides, there were allegations which, if proved, would show she was a national and that there was a refusal to issue a passport. The defendant denied these allegations. This was sufficient basis for jurisdiction. The court was then required to try the matter.

* * * * *

" . . . where allegations have been made which are necessary for jurisdiction, the action will fail if these are not proved. The reservation in 12(h), Federal Rules of Civil Procedure, is for extraneous circumstances, which demonstrates that the court has not

authority to hear and determine. All tribunals in the federal system must at all stages of the proceeding make certain of the possession of power to act. But, where there are allegations of key jurisdictional facts which are controverted, there always exists power to try the issues thus made. Jurisdiction existed to try the questions here.”

III.

Finding of Fact IV Is Supported by the Evidence.

The action of a consular officer in denying an application filed by an alleged foreign born son of an American citizen for a passport to the United States is a denial of a claimed right or privilege as a national of the United States upon the ground that he was not a national of the United States, such as would give the federal court jurisdiction to determine nationality status. (*Fong Nai Sun v. Dulles*, 219 F. 2d 269; *Chin Chuck Ming v. Dulles*, 225 F. 2d 849.)

Plaintiff's passport application was executed and filed with the United States Consulate General at Hong Kong on May 6, 1952. The present action was filed December 22, 1952, at which time there had been no formal denial of plaintiff's application for a passport. The court found, however, that the delay in acting upon the application was unreasonable and the failure to act on the application within a reasonable time was a denial of plaintiff's rights and privileges as a national and citizen of the United States.

Webster's New International Dictionary, Second Edition, defines the word “deny” as follows:

- “1. To declare not to be true; gainsay, contradict; —opposed to affirm, allow or admit. 2. To refuse

(one who asks). 3. *To refuse to grant; to withhold; to refuse to gratify or yield to;* 4. . . . *to refuse to acknowledge . . .*” (Italics added.)

Clearly by withholding the issuance to appellant of a travel document which would enable her to proceed to the United States, and to which any American citizen is entitled as a matter of right, defendant has in effect denied her such right upon the ground that she is not a citizen of the United States. Upon no other ground could the consul withhold or decline to issue the travel document.

An unreasonable delay in acting upon a passport application is equivalent to a denial thereof (*Chin Chuck Ming v. Dulles, supra.*) Appellant maintains that under the circumstances in the instant case, a delay of seven and a half months in acting upon her passport application was unreasonable and an implied denial thereof.

As was aptly stated by the court in *Nuspel v. Clark*, 83 Fed. Supp. 963, at page 965:

“Counsel for defendant asserts that this ‘holding in abeyance’ does not constitute a denial of such rights and privileges. It seems, however, the failure to grant the visa for plaintiff’s wife within a reasonable time constitutes a denial of such application equally as much as justice delayed is justice denied.”

Over the objection of plaintiff, defendant introduced into evidence “Statement Regarding the Processing of Passport Applications at the American Consulate General in Hong Kong.” [Deft. Ex. “C”.] Plaintiff maintains that her objection should have been sustained since the evidence is clearly incompetent, irrelevant and immaterial. However, assuming but not conceding that the evidence was admissible, it supports plaintiff’s contention that the delay in processing her case was unreasonable. It would

appear from that document that defendant claims that the reasons for the delay in the processing of passport applications were the transfer to the Hong Kong Consulate of 2000 cases and the lack of facilities and personnel to process such cases; that on September 1, 1950, there was a backlog of 3600 cases; that insofar as possible, claims were processed in the chronological order of their initiation;" that in November 1950, the Department

"assigned a Foreign Service Inspector, two Departmental employees, and fourteen members of the Foreign Service to Hong Kong, and authorized the employment of sufficient local alien personnel to serve as interpreters and give clerical assistance, to work on the backlog of pending citizenship claims in an effort to process them all at the earliest possible date, while continuing to work on the cases still coming in at the rate of approximately 150 a month;"

that by July 1, 1951, the backlog had been reduced to 2100, some 600 of which were not "live;" that from July 1, 1951, to July 1, 1952, 2609 cases were processed and by July 1, 1952, new claims were reduced to 25 per month. It would appear, therefore, that by the middle of 1952, there were only 25 new applications being filed each month and with the additional facilities and personnel, it is obvious that the applications could be acted upon within a seven months period.

As was stated in *Chin Chuck Ming v. Dulles, supra*, at page 852:

"We construe the words 'right or privilege as a national of the United States' of the first two lines of Section 503 to cover the right to a prompt disposition of a claimed citizens' application . . .

* * * * *

“Dulles contends that we should take judicial notice of the fact that a large number of similar applications were pending on September 6, 1951 when appellants’ was filed and that Congress has not appropriated sufficient funds to give him the qualified personnel at Hong Kong to enable the State Department to dispose of them in the intervening months. He makes no claim that he applied to Congress for such funds. Assuming we can take such judicial notice, we think the right to a prompt consideration of appellants’ application cannot be denied them for such a reason.”

See also:

Lee Bang Hong v. Acheson, D. C. Hawaii, 110 Fed. Supp. 48, 50;

Lee Hong v. Acheson, D. C. N. D. Cal., 110 Fed. Supp. 60;

Look Yun Lin v. Acheson, D. C. N. D., Cal., 95 Fed. Supp. 583, 584.

Moreover, at the time plaintiff’s passport application was filed, she was barely eleven years of age. The passport applications of her two older brothers, Tam Hem Wing and Tam Hem Fook, had just been processed. The application of Tam Hem Wing was filed October 23, 1951. [Pltf. Ex. 2(b).] It was processed with that of his brother and the testimony of plaintiff and her two brothers was taken in March 1952, in connection with those passport applications. A recommendation of denial was made by the Vice Consul on April 30, 1952, and on May 20, 1952, the applicants were advised that they had failed to establish their identity as citizens of the United States and their passport applications were disapproved. Thus, the processing of plaintiff’s brothers’ applications was com-

pleted in six months and a formal denial made in seven months.

Despite the fact that the Consulate had already investigated the citizenship claims of the family and taken testimony with reference thereto immediately prior to the filing of plaintiff's application, and the further fact that plaintiff was a child of only eleven years of age, no action whatsoever was taken on plaintiff's application prior to the filing of the instant action. Plaintiff had not been called in for an interview nor had she been asked to submit additional evidence. It appears obvious from the report of consular investigation in the passport file [Pltf. Ex. 1] that the application was denied because her two brothers, who were her identifying witnesses, had been refused as not being the persons they claimed to be. There appears to be no reason why such a conclusion could not have been reached within a period of seven months after the application of plaintiff was filed.

In *Yung Jin Teung v. Dulles*, 229 F. 2d 244, at page 246, the court stated:

"First of all we note that the State Department may have effectively determined the plaintiffs' claim of citizenship adversely even though it took no final official action which explicitly constituted such a determination. Thus a passport may be denied on the statutory ground by a refusal to determine a claim of citizenship for an unreasonable length of time, *Chin Chuck Ming v. Dulles*, 9 Cir., 1955, 225 F. 2d 849, or by insisting upon the production of evidence of citizenship when it is clear that the applicant cannot produce it. *Wong Ark Kit v. Dulles*, D. C. D. Mass. 1955, 127 F. Supp. 871; *Ow Yeong Yung v. Dulles*, D. C. N. D. Cal. 1953, 116 F. Supp. 766. On the other hand if a delay in acting on an appli-

cation is entirely the fault of the applicant, then such delay would not constitute a denial. Thus where the consul informs the applicant that no decision has been reached and requests certain additional evidence, there may yet be no effective denial if the applicant has neither produced additional evidence nor informed the consul that he will not do so. *Ling Share Yee v. Acheson*, 3 Cir., 1954, 214 F. 2d 4, certiorari denied 1954, 348 U. S. 873, 75 S. Ct. 109, 99 L. Ed. 687. We must therefore determine whether the papers here show that there had been no explicit adverse determination of the plaintiffs' claim and, further, that there had been no implicit adverse determination within the principle of these decisions."

The court further stated, on page 247:

" . . . it should be noted that the statute barring suits after December 24, 1952 was passed in June of 1952, thus putting the government on notice that unless it acted in six months applicants might lose their rights to bring action under the statute."

It is submitted that there was ample evidence upon which the trial court find, as it did, that the delay of seven and one-half months in acting upon plaintiff's passport application was unreasonable and that therefore there was an implied denial thereof. The trial court having obtained jurisdiction pursuant to Section 503 of the Nationality Act, the judgment was proper and should be affirmed.

Respectfully submitted,

KATHLEEN PARKER,

Attorney for Appellee.

United States
Court of Appeals
for the Ninth Circuit

WILLIAM H. MARTIN, doing business as Martin's Auto Trimming, Inc., on behalf of itself and others similarly situated, Appellant,

vs.

T. C. COLEMAN ANDREWS, as the duly appointed and acting Collector of the Internal Revenue Service of the United States, and ROBERT A. RIDDELL, as Director of the Internal Revenue Service for the Southern District of California, Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

FILED

MAR 20 1956

PAUL P. O'BRIEN, CLERK

No. 14949

United States
Court of Appeals
for the Ninth Circuit

WILLIAM H. MARTIN, doing business as Martin's Auto Trimming, Inc., on behalf of itself and others similarly situated, Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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* Page numbers appearing at foot of page of original Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

No. 17411-PH

WILLIAM H. MARTIN, doing business as MARTIN'S AUTO TRIMMING, INC., on behalf of itself and others similarly situated,

Plaintiffs,

vs.

T. C. COLEMAN ANDREWS, as the duly appointed and Acting Collector of the Internal Revenue Service of the United States, and ROBERT A. RIDDELL as Director of the Internal Revenue Service for the Southern District of California,

Defendants.

COMPLAINT FOR INJUNCTION TO RESTRAIN ASSESSMENT OR COLLECTION OF EXCISE TAXES

Come now the plaintiffs above named and for a first cause of action against the defendants and each of them, allege as follows:

I.

That the plaintiff Martin's Auto Trimming, Inc., during all of the time hereinafter mentioned was and still is a corporation, organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the Southern District of California.

II.

That the plaintiff Martin's Auto Trimming, Inc.

brings [2] this action on its own behalf and on behalf of all others similarly situated. That said persons number approximately two hundred, and it is therefore impracticable to bring them all before this Court. That the same legal questions are involved as to all members of this class. That all of the persons and firms hereinafter referred to are similarly situated. That the character of the relief sought is applicable to all of the persons hereinafter referred to.

III.

That at all times herein mentioned plaintiffs and each of them were each engaged in the business of operating an automobile upholstery shop located in the Southern Central District of the State of California. That plaintiffs and each of them were engaged in making custom made to order seat covers by individual design and measurement for the respective automobiles of their customers. That plaintiffs made and sold custom made seat covers to individuals and to new and used car dealers. That none of the plaintiffs herein made any seat covers by pattern during any time referred to in this complaint, and none of the plaintiffs stocked any seat covers.

IV.

That the Collector of Internal Revenue of the United States Treasury Department, acting through his agents, has heretofore notified the plaintiffs and their attorney that the plaintiffs and each of them are liable for an excise tax of 8% of the gross amount of all sales of automobile seat covers, manu-

factured and sold by them between the year 1932 to and including August 18, 1952, to new and used car dealers.

V.

That the defendants are now threatening to assess and collect a tax from the plaintiffs and all other automobile upholstery shop owners in this district and in the State of California for any automobile [3] seat covers manufactured and sold by them to new and used car dealers prior to August 18, 1952 and to enforce against them such penalties as provided by law should they fail to pay said excise tax immediately.

VI.

That the defendants have assessed an excise tax against plaintiffs' firm for the manufacture and sale by them of custom made seat covers for the period August 1, 1950 to August 31, 1952 in the sum of \$11,917.73. That a number of other auto upholstery shop owners for whom this action is being brought have received notice of proposed taxes to be assessed against them and others have been notified by the defendants that the defendants propose to assess a tax against them in a large sum of money for custom made to order auto seat covers manufactured and sold by them to new and used car dealers, for the period 1932 to August 18, 1952.

VII.

That the plaintiff Martin's Auto Trimming, Inc. alleges that it and the other auto upholstery shops for whom this class action is brought will suffer

irreparable injury and damage unless given relief against the enforcement of the tax assessments, as many of them are unable to pay the tax without great financial hardship to the continued safe operation of their businesses. That many of the trim shop owners will, in fact, be either forced to close their businesses if the defendants insist upon immediate payment of the aforementioned tax and others will be required to either mortgage their homes or make loans to obtain the money to do so.

VIII.

That none of the plaintiffs have collected any excise tax from their customers for the period mentioned hereinabove for any custom made seat covers made by them during this period of time. [4]

IX.

That many of the plaintiffs herein, as a result of their failure to have collected any excise tax from their customers are now without sufficient funds of their own to pay these taxes at this time without grossly and seriously depleting their working capital. That many of the plaintiffs would be subjected to oppression and injustice in that they would actually be forced to close down and liquidate their business, if defendants insist upon payment of the tax, inasmuch as they actually do not have the funds to pay such a tax at this time.

X.

That the equity jurisprudence of this Court is invoked to prevent a multiplicity of suits by such

of the auto upholstery shop owners who may under threat of levy and seizure of their business, borrow the money to pay the tax. That if these plaintiffs are required to pay the tax and are compelled to resort to a court of law to recover the amount so paid, the business of this Court will be obstructed by the number of cases of the same character.

XI.

Section 3403 of the Internal Revenue Code of the United States, upon which the defendants rely for the assessment of the tax against plaintiffs provides in part as follows: "There shall be imposed upon the following articles sold by the manufacturer, producer or importer, a tax equivalent to the following percentages of the price for which so sold; (c) parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsection (a) or (b), 2 per centum."

XII.

That Section 3403(a) refers to automobile truck chassis, automobile truck bodies and tractors and, Section (b) refers to other automobile chassis and bodies and motorcycles (including in [5] each case parts or accessories therefor sold or in connection therewith or with the sale therewith except tractors, 3%. A sale of an automobile shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

XIII.

Section 316.2 of the Internal Revenue Code reads

“the taxes on the sale or use of articles covered by these regulations were originally imposed by title 4 of the Revenue Act of 1932. The applicable provisions of the Revenue Act of 1932 were superseded effective March 1, 1939 by provisions of the Internal Revenue Code.

XIV.

That Section 3403(c) was amended in 1951 to provide for a tax of 8 per centum up to and including April 1, 1954.

XV.

That the defendants have interpreted accessories to include automobile seat covers.

XVI.

That between the period of 1932, the effective date of the Revenue Act of 1952 and until the 18th day of August, 1952 the defendants herein by and through their duly authorized officials acting within the scope and course of their employment with the defendants did make and issue a number of official regulations and opinions on various successive dates, both orally and in writing, to various of the plaintiffs, uniformly holding and stating that no excise tax attaches to any auto seat covers made by the plaintiffs if made by individual measurement and not by pattern and without regard as to whether the seat covers were made and sold to either individuals or to new and used car dealers.

XVII.

That the aforesaid regulations and opinions were rendered by officials of the defendants while in the employ of the defendants [6] and while acting within the limits of authority lawfully conferred upon them by the defendants and whose duty it was to interpret and enforce the excise tax laws concerning automobile seat covers.

XVIII.

That the plaintiffs and each of them in good faith at all times herein mentioned relied upon these representations and opinions.

XIX.

That the aforementioned representations and opinions were made by these officials to the plaintiffs intending that the plaintiffs and each of them rely thereon. That plaintiffs did rely thereon, and in the operation by them of their respective business, did not include in any sales made by them any excise tax for any seat covers made to measure by them, whether made for individuals or for new or used car dealers for the period prior to August 18, 1952.

XX.

That plaintiffs were ignorant of defendants' intention to later assert for the first time on and after August 1952, that the plaintiffs were to be subject to and liable for an excise tax retroactively on any automobile seat covers made by them for new or

used car dealers, even though made to measure and immediately installed and not placed in stock.

XXI.

On August 18, 1952 the defendants for the first time since the enactment of the Revenue Act of 1932 did issue and publish a notice stating that if a manufacturer furnishes material and makes automobile seat covers, whether according to pattern or by individually measured jobs, all sales of such seat covers would be henceforth taxable under Section 3403(c) of the Internal Revenue Code, as amended, notwithstanding any previous regulations by the [7] defendant to the contrary.

XXII.

That the defendants are now seeking to impose upon plaintiffs and each of them payment of an excise tax for all automobile seat covers manufactured and sold by them on individually measured jobs and not out of stock on sales made to new or used car dealers prior to August 18, 1952.

XXIII.

That by reason of the opinions and regulations issued by the defendants' officials, as aforesaid, the defendants are now estopped to assess a tax against plaintiffs for any automobile seat covers manufactured and sold by them to new or used car dealers prior to August 18, 1952, when such seat covers have been made by individual design and not by

pattern and were immediately installed and not taken from stock.

XXIV.

That the amount in controversy herein exceeds the sum of \$3,000.00.

XXV.

That T. Coleman Andrews is the duly appointed and Acting Collector of Internal Revenue of the United States and Robert A. Riddell is the District Director of the Internal Revenue Service for the Southern District of California.

XXVI.

That unless injunctive relief will be granted plaintiffs will suffer irreparable injury and damage and they will be subjected to oppression and injustice.

XXVII.

This action arises under the Internal Revenue Codes Title 26.

For a Second, Separate and Distinct Cause of Action the Plaintiffs Allege as Follows: [8]

I.

Plaintiffs incorporate herein paragraphs I to XV inclusive of the first cause of action, with the same force and effect as if fully set forth herein, also paragraphs XXIV to XXVII.

II.

That over a period of twenty years the defend-

ants herein consistently issued various opinions and regulations both oral and in writing to various of the plaintiffs, interpreting section 3403 of the Revenue Act as applicable only to manufacturers of automobile seat covers and who, in fact, manufactured the seat covers by patterns and placed them in stock and in like manner held that this section did not apply to automobile upholstery shops who made seat covers by individual measurement immediately tailored to the respective automobile.

III.

That the plaintiffs and each of them are not manufacturers but are automobile upholsterers. Plaintiffs do not cut any material for seat covers by pattern, but each automobile seat cover job is individually tailored to the measurement of the automobile upholstery in each case.

IV.

That plaintiffs did not include in their selling price any part of the manufacturer's excise tax for any period prior to August 18, 1952, in the sale of automobile seat covers by them individually tailored by measurement and immediately installed in that they relied upon the rulings and opinions issued by the defendants.

V.

The predecessor of the defendant made and published an official regulation number 46 Article 36 also known as S.T. 582, which provides as follows:

“Repairs on automobiles performed in [9] a repair shop, such as painting, auto upholstery, changes in, or replacements of woodwork and repairs to finders and bodies are deemed to be in the nature of general repair work rather than articles sold and are not subject to tax under section 606 of the Revenue Act of 1932.”

VI.

The ruling aforementioned was a regulation promulgated according to statute and under the authority vested in the defendants. That subsequent to the publication by the Internal Revenue Department of the aforementioned regulation, various officials in the employ of the defendants did thereupon interpret said regulation to exempt from the liability of an excise tax all automobile seat covers individually tailored by measurement to the respective automobiles and immediately installed, made by auto upholstery shops.

VII.

That the defendants, on August 18, 1952, made and issued a new regulation described as Regulation 46 (1940) Section 316.55 S.T. 944 reading as follows:

“76,339 ST 944—Excise Tax—sale of automobile seat covers by the manufacturer is taxable, including those produced according to individual design and measurement for the consumer—as to sales that were previously ruled nontaxable the new ruling will not apply to sales prior to August 18, 1952. (See also 38,568).”

Application of the tax, imposed by section 3403 (c) of the Internal Revenue Code, as amended, to the sale of automobile seat covers by a manufacturer who furnishes the material therefor and produces them for the consumer thereof according to individual design and measurement.

Section 3403(c) of the Code, as amended, imposes, effective November 1, 1951, a tax of 8 percent on the sale by the manufacturer [10] of parts or accessories for vehicles taxable under subsection (q) and (b) of section 3403 of the Code, as amended, except that on and after April 1, 1954, the rate of tax shall be 5 per cent. Seat covers for automobiles are considered to be parts or accessories within the meaning of section 3403(c) of the Code, as amended and sales thereof by the manufacturer are subject to tax.

The Bureau has issued rulings heretofore, that the only circumstances under which the tax does not apply to sales of seat covers by a manufacturer, is where the seat covers are individually designed, cut tailored, and fitted by the manufacturer to the automobile belonging to the person who contracts for the performance of such operation, and such person is the consumer of the seat covers. Such rulings provided, however, that the sale of seat covers, similarly produced, to a dealer in new or used automobiles is not a sale for consumption but one for resale, and that the tax attaches to the manufacturer's sales thereof.

Upon reconsideration of the matter, the Bureau

is now of the opinion that where a manufacturer furnished the material and produces automobile seat covers for the consumer thereof, according to individual design and measurement, the sale by the manufacturer of such seat covers is taxable under section 3403(c) of the Code, as amended, regardless of whether they are installed by the manufacturer or by other persons.

The Bureau has issued rulings, as stated above, that sales by a manufacturer of seat covers, produced according to individual design and measurements, to a dealer in new or used cars are not considered sales for consumption, and are subject to tax. The taxability of such sales is not affected by the ruling herein, and tax continues to attach, as in the past to such sales.

Because of the past rulings of the Bureau concerning the non-application of the tax to automobile seat covers which are [11] produced according to individual design and measurement for the consumer thereof, it has been concluded that, under the authority contained in section 3791(b) of the Code, the ruling set forth herein relating to seat covers so produced will not be applied retroactively with respect to sales of such seat covers prior to the date of this bulletin, except that any tax which has been paid on the sale of such seat covers will not be refunded, unless in a particular case it is established to the satisfaction of the Commissioner, as required under section 3443(d) of the Code, that the manufacturer, by reason of relying on an exist-

ing ruling that the sale of seat covers so produced was not taxable, did not include in his price any part of the manufacturers' excise tax which he may have subsequently paid on the sale (S.T. 944 1952-17-13906).

VIII.

That in the aforementioned regulation the defendants have now prescribed that automobile seat covers made according to individual design and measurement will be subject to excise tax on and after August 18, 1952, but that said regulation will not apply to sales prior to August 18, 1952, made to consumers.

IX.

The defendants have now determined that only automobile seat covers individually designed, cut, tailored and fitted by the manufacturer to the automobile belonging to the person who contracts for the performance of such operation and when such person is the consumer of the seat cover is to be exempt from any excise tax prior to August 18, 1952, but that any auto seat covers made by plaintiffs for new or used car dealers, even though individually made to design and measurement were and are, nevertheless, subject to excise tax.

X.

That many of the plaintiffs in this action, including plaintiff, Martin's Auto Trimming, Inc., are primarily engaged in making [12] seat covers and other upholstery work for new and used car dealers

rather than the general retail trade although they do in fact do work for both. That there are many auto upholstery shops who cater only to retail customers and do not render any work for new or used car dealers.

XI.

That the determination of August 18, 1952, S.T. 944, that auto seat covers tailored to measure by individual design and sold to the person who contracts for the seat covers is not subject to a tax retroactively but that such sales are subject to excise tax on sales made on and after August 18, 1954, and that auto seat covers made by individual design and not by pattern for a dealer, in new or used automobiles is subject to an excise tax retroactively prior to August 18, 1952, was arrived at by the defendants by fundamental wrong principles and is arbitrary and confiscatory and constitutes a denial of the equal protection of the law as provided for by the Fourteenth Amendment to the Constitution of the United States, by exempting the tax on sales to retail customers when the retail customer personally contracts for the purchase of the seat covers, but applying the tax on such sales if the sale is arranged by or made through a new or used car dealer.

XII.

That in those instances where the plaintiffs have made seat covers for new and used car dealers which is the subject matter of this proceeding, invariably the dealer has in the first instance already

sold the automobile in question to a retail customer and has either as an inducement to the customer to purchase said automobile or by way of a separate sales transaction made the necessary arrangements with the plaintiffs to make and install a set of seat covers for the automobile purchased by the retail customer from them. That in this connection the new or used car dealer is simply [13] acting as an agent for the retail customer and, in fact, in many instances the retail customer himself appears at the place of business of the plaintiffs and selects the materials from which the seat covers are to be made. That there is, in fact, therefore, no reasonable basis upon which to distinguish a sale to a retail customer when such sale is arranged through a new and used car dealer or when the retail customer appears in person at plaintiff's place of business and makes all the necessary arrangements and the purchase himself.

XIII.

That the determination exempting those automobile upholstery shops from the payment of an excise tax for automobile seat covers individually made by them for the consumer of the seat covers and in turn holding that the plaintiffs who are engaged in making automobile seat covers for new or used car dealers, as aforesaid, are subject to an excise tax is a denial of the equal protection of the law and is in violation of the Fourteenth Amendment to the Constitution of the United States.

For a Third, Separate and Distinct Cause of Action, Plaintiffs Allege as Follows:

I.

Plaintiffs incorporate herein paragraphs of the first cause of action with the same force and effect as if fully set forth herein. (Paragraphs I to XV and XXIV to XXVII.)

II.

That the plaintiffs all of the time herein mentioned were not manufacturers, producers or importers of automobile seat covers; but are automobile upholsterers. That they do not use any patterns such as are customarily used by automobile seat cover manufacturers. That each seat cover made by them is made by individual design and is tailored to the upholstery of the respective automobile. [14] That each seat cover is individually, cut, tailored and fitted by the plaintiffs to the automobile upholstery and immediately installed. That section 3403 of the Internal Revenue Code of the United States upon which the defendants rely for the assessment of a tax against the plaintiff is applicable to accessories manufactured and sold by manufacturers, producers or importers. That the plaintiffs herein and each of them are neither manufacturers, producers or importers of automobile seat covers. That the transactions in which these plaintiffs are engaged is one involving the sale of labor and material and not the sale of an accessory within the meaning of said section.

For a Fourth, Separate and Distinct Cause of Action, the Plaintiffs Allege as Follows:

I.

Plaintiffs incorporate herein paragraphs I of the first cause of action with the same force and effect as if fully set forth herein. (I to XV and XXIV to XXVII.)

II.

That heretofore a regulation was made by the defendants known as Regulation 46, S.T. 928, holding that glass cut to automobile pattern pursuant to a customer's order, if installed by the person who cuts such glass, that the excise tax will not attach for the reason that the transaction is deemed to be one involving the sale of labor and material and not the sale of an automobile part or accessory.

III.

That in making a determination that automobile seat covers made by individual pattern and designed and installed by the person who makes the same are subject to excise tax and is not one involving the sale of labor and material as was determined by Regulation 46 S.T. 928, when applied to glass for automobiles, is discriminatory and arbitrary and is a denial to the plaintiffs of the equal protection [15] of the laws afforded by the Fourteenth Amendment of the Constitution of the United States, in that it discriminates against the plaintiffs on the identical method of operation in favor of shop owners en-

gaged in the business of installing glass on automobiles.

Wherefore, plaintiffs pray judgment for a decree of this Court that the defendants and each of them, their agents, servants, employees and attorneys be perpetually enjoined and restrained from the collection of any excise tax levied and assessed by the defendants against the plaintiffs or either of them for automobile seat covers made by them prior to August 18, 1952 which they have designed, cut, tailored and fitted to the automobiles and immediately installed, on sales made to new or used car dealers or consumers.

That the defendants be decreed by a mandatory order of this Court to pay back the tax which has been collected by the defendants to the persons who paid the same, in the event such payment has been made at the time of the trial of this case. In the meanwhile and during the pendency of this action, a temporary injunction be granted commanding the defendants and each and everyone of them, their agents, servants, employees and attorneys to absolutely desist and refrain from assessing or proceeding with the assessment or from collecting or attempting to collect any and all taxes levied or assessed by the Collector of Internal Revenue Department against the plaintiffs or either of them, for custom made to order seat covers made and sold by them to new and used car dealers prior to August 18, 1952, or to the direct consumer thereof, or from collecting or attempting to collect the tax

mentioned and described in this complaint, and from enforcing or attempting to enforce the same in any way whatever, and for such further judgment of payment in the premises as may be just and equitable, including the cost of suit.

/s/ PHILL SILVER,

Attorney for Plaintiffs [16]

Duly Verified. [17]

[Endorsed]: Filed Oct. 29, 1954.

[Title of District Court and Cause.]

MOTION FOR PRELIMINARY INJUNCTION

Come now the plaintiffs, above named, and move the Court for a preliminary injunction in the above entitled cause, enjoining the defendants, their agents, servants, employees, and attorneys, from assessing or proceeding with the assessment or from seizing, taking by distraint and selling any of the goods, chattels, effects, including stocks, securities, bank accounts, evidences of debt or other personalty, and real property of the above named plaintiffs.

The grounds in support of this motion are as follows:

1. That heretofore the Commissioner of Internal Revenue made an assessment of excise taxes under Section 3403(b) of the Internal Revenue Code, as amended, in various amounts against plaintiffs and

notified various other of the plaintiffs that [27] defendants proposed to make assessments of taxes in large sums of money;

2. That the plaintiffs are not subject to such taxes, nor interest or penalties which may be added thereto;

3. That the plaintiffs do not have the funds with which to pay the greater portion of such taxes, interest, and penalties;

4. That if the Director of Internal Revenue for the State of California whose duty it is to collect such taxes, proceeds to do so by distraint or levy, the warrant could not be satisfied, inasmuch as many of the plaintiffs do not have the funds to pay these taxes;

5. That any attempt by defendants to collect the tax by levy or distraint would prove to be arbitrary and oppressive, work a complete cessation of the business of the plaintiffs and completely destroy the same, ruin them financially, and inflict losses for which they would have no remedy at law;

6. That by reason of such special, exceptional and extraordinary facts and circumstances, Section 3653 of the Internal Revenue Code does not apply;

7. The plaintiffs have no adequate remedy at law, in that they have no alternative but to pay the tax levied under Section 3403(b) and sue for a refund, in order to have the validity of the assessment litigated;

8. That the defendants, their agents, employees,

attorneys, and servants will immediately seize upon distraint and sell all of the personal and real property of the plaintiffs, unless they are, by order of this Court, restrained;

9. Immediate and irreparable¹ injury, loss and damage will result to the plaintiffs by reason of the threatened action of the defendants, as more particularly appears in the verified [28] complaint and affidavit of the plaintiff filed herein.

Wherefore, plaintiffs move that a preliminary injunction be issued by this Court, in accordance with the prayer in the verified complaint, restraining defendants, their agents, employees, servants and attorneys and all persons acting by, through or under them, or either of them, or by or through their order from making any further assessments against plaintiffs and from levying upon or seizing upon distraint and selling any of the real or personal property of the plaintiffs or either of them.

/s/ PHILL SILVER,

Attorney for Plaintiffs [29]

[Endorsed]: Filed Oct. 29, 1954.

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
County of Los Angeles—ss.

William H. Martin, being first duly sworn, deposes and says: That he is the president of Martin's Auto Trimming, Inc., a corporation. That Martin's Auto Trimming, Inc. has been incorporated under the laws of the State of California, is duly licensed and has its principal place of business in the Southern District of California.

That Martin's Auto Trimming, Inc. is engaged in the automobile upholstery business, primarily servicing new and used car dealers. That the major portion of its business is confined to new and used car dealers and a minor portion of its business to [30] the general public at large.

That some time in 1936 your affiant opened an automobile upholstery shop at 2329 South Figueroa Street in Los Angeles, California, under the fictitious name of Martin Auto Works. That at the time affiant commenced operation, your affiant personally visited the office of the Bureau of Internal Revenue in Los Angeles and upon inquiry was directed to one of the officials in charge of the office. Your affiant thereupon asked this official as to whether an excise tax was applicable on custom made to order seat covers made to individual measurement and tailored to the upholstering of the cars by affiant. That your affiant was thereupon

informed by this official, who appeared to be in charge of the Los Angeles Bureau of Internal Revenue, Excise Tax Division, that an excise tax was only applicable to ready made seat covers if cut by patterns and if carried in stock as a finished product, and that there was no excise tax applicable to any seat covers made to individual measurement and immediately installed on the upholstery of the automobiles.

In 1945 your affiant changed from Martin Auto Works to Martin's and moved to 1243 South Alvarado Street, Los Angeles, California. That shortly thereafter and in that same year your affiant again visited the Los Angeles Bureau of Internal Revenue to review the subject of excise tax on seat covers made by affiant. On this occasion affiant was referred to Mr. Herbert G. Barnett, who was an official in the employ of the Los Angeles Bureau of Internal Revenue. That your affiant explained to Mr. Barnett that he was engaged in the automobile upholstery business with the major part of his business new and used car dealers; that all seat covers which they made were made by them on their own premises and were made to the individual measurement of each automobile and were immediately installed on the upholstery of the respective automobile. That your affiant informed Mr. Barnett that he had previously been [31] advised by the Los Angeles office of the Internal Revenue Department in 1936 that there was no excise tax on custom made to order seat covers and wanted to know if there was any change in the law. Mr. Bar-

nett stated to your affiant that there had been no change in the law and that an excise tax was only applicable on auto seat covers manufactured by patterns as a finished seat cover and carried in stock, and that there was no excise tax on custom made to order seat covers. That thereupon your affiant continued the operation of his seat cover shop without including in the selling price any excise tax for any automobile seat covers made by him or his employees tailored to the individual automobiles of his customers. That he continued this method of operation until approximately September of 1952 when your affiant received a notice in the mail from the Bureau of Internal Revenue stating that commencing August 18, 1952, all sales of seat covers were to be taxable thereafter, regardless of whether they were installed by the manufacturer or by other persons. A copy of this ruling is hereby attached and marked "Exhibit A" and incorporated and made a part of this affidavit.

That at all times referred to in plaintiffs' complaint, your affiant as well as of all of the plaintiffs for whom this action was brought, were engaged in operating custom made to order auto upholstery shops and were not operating as manufacturers of automobile seat covers. That each seat cover which they made was made by them on each individual automobile by individual design and not by pattern and was immediately tailored to the upholstery of the automobile. That all the work performed by the plaintiffs comes under the category of auto upholstery and not under the category of manufac-

turing. That none of the plaintiffs make any seat covers by pattern nor did they stock any seat covers at any of the times involved herein. This distinction was recognized by the predecessors of the defendants herein in the sale of bulk [32] yardage from rolls for an official regulation was made and published by the predecessor of the defendants herein known as Regulation 46 Article 41 S.T. 824, which reads as follows: "If the part or accessory is cut or produced from lengths or rolls of material for immediate use by a repairman in a repair job on which he is then working, the sale thereof by the jobber or dealer to the repairman is deemed to be a sale of material not subject to tax. If, however, the jobber or dealer transforms lengths of rolls of material into parts or accessories and places the finished articles in stock for future use or disposition, he thereby becomes the manufacturer of such articles and his subsequent sale or use thereof is taxable under Section 606 of the Revenue Act of 1932."

That for twenty years the defendants herein and their predecessors interpreted the aforementioned regulations and section 3403(c) of the Internal Revenue Code to require the payment of an excise tax only on auto seat covers manufactured and placed on shelves for stock and that seat covers made to order installed immediately on automobiles were not subject to excise tax. That attached hereto and made a part hereof and marked "Exhibit B" is a letter dated October 14, 1947 on the official stationery of the Treasury Department directed to Black-

wood Auto Seat Covers, one of the plaintiffs herein and signed by Leo C. Reusche, who was then Assistant Chief Miscellaneous Tax Division of the Internal Revenue Service. That in this letter Mr. Reusche stated the following:

“As the manufacturer of seat covers you are required to keep adequate records on your sales. The manufacturers’ tax of 5 per cent on your net selling price applies under Section 3403(c) to sales of seat covers from your shelves, made up by you as stock. If, as it appears, you have car owners bringing in cars requesting you to make to order seat covers from materials you stock, which you install in their cars, no tax applies.” [33]

That in 1948 an agent then in charge of the Los Angeles Internal Revenue Service, Excise Tax Division, did make similar representations to one Rubie Gilbert, a public accountant. An affidavit made and executed by Rubie Gilbert on behalf of these plaintiffs is attached hereto, marked “Exhibit C” and is incorporated herein by reference. That as appears from said affidavit, Rubie Gilbert was informed by the Los Angeles Internal Revenue Bureau that there was no excise tax collectible on any custom made to order seat covers, whether made for retail customers or wholesale customers, but that the only tax collectible would be on seat covers manufactured and placed in stock.

That attached hereto is an affidavit made and executed by Louis Lampert, who is a certified public accountant, which recites that he, on or about

February 1950 telephoned the Los Angeles Internal Revenue Bureau, Excise Tax Division; that he was connected with the head of the Excise Tax office of the Los Angeles Internal Revenue Bureau and that he was informed that the Los Angeles Internal Revenue Bureau had received word from Washington that there was no tax to be collected on custom made to order seat covers, but that the only excise tax to be collected was on the wholesale manufacture of auto seat covers in the package, that is to say, box covers that were shipped out for installation by the customers themselves, such as seat covers being shipped to a car dealer where the car dealer maintains his own installation facilities, but that any auto seat cover manufactured and installed on the premises and on the car whether the customer be a new or used car dealer or a retail customer, that there would be no excise tax chargeable or payable. This affidavit is incorporated herein by reference and marked "Exhibit D".

Your affiant states that various agents in the employ of defendants and their predecessors in office, acting in the course of their employment, have consistently prior to August 18, 1952, [34] represented to the plaintiffs by letter and by oral statements that there was no excise tax to be charged or collected by them for any automobile seat covers custom made by them to individual measurement, and that there was an excise tax on automobile seat covers if manufactured by patterns and placed in stock for future sale. As hereinabove previously alleged, neither the plaintiff nor any of

the plaintiffs have at any time manufactured seat covers for stock, but have tailored each respective seat cover to the individual measurement of the individual automobile and have in each instance made an immediate installation on these respective automobiles. That these plaintiffs and your affiant relied in good faith upon the opinions and statements made and issued by the agents of the defendants and their predecessors, as hereinbefore set forth, and did not include in their selling price an excise tax for any seat covers made and installed by them at any time prior to August 18, 1952.

Section 379(b) of the Internal Revenue Code provides as follows: Retroactively of Regulations or Rulings. The Secretary or the Commissioner, with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation or Treasury decisions relating to the Internal Revenue laws, shall be applied without retroactive effect. That the notice hereinabove referred to, as plaintiffs' "Exhibit E" entitled Modification by the Bureau of the Internal Revenue relative to custom made seat covers effective date August 18, 1952 is an official determination by the defendants herein that there is and was no excise tax on custom made to order seat covers prior to August 18, 1952 on sales made to "consumers," and that effective on and after August 18, 1952 there was to be an excise tax on seat covers whether manufactured according to pattern or by individual measured jobs and regardless of whether they are installed or manufactured by other persons, but that such tax would not

apply [35] to sales made to the consumer prior to August 18, 1952, but would apply to sales made to new or used car dealers prior to August 18, 1952. Your affiant states that this determination making effective an excise tax on auto seat covers, effective on and after August 18, 1952 regardless of how the seat covers were manufactured, to wit, whether by pattern or individual design, but determining that such tax would not be applied retroactively on sales made to consumers but would be applicable retroactively on sales made to new and used car dealers is an attempt on the part of the defendants to repudiate the many opinions made by defendants' agents wherein these agents led affiant and plaintiffs to believe that there was no tax applicable on such sales. Affiant states that such a determination and ruling is discriminatory, arbitrary and unreasonable and constitutes a denial to these plaintiffs of the equal protection of the law as provided for by the Fourteenth Amendment of the Constitution of the United States.

Your affiant states that he has been handed a document by the agents of the defendants entitled Proposed Assessment, wherein the defendants propose to assess a manufacturer's excise tax against Martin's Auto Inc. in the sum of \$11,917.73, for the manufacture and sale by them of custom made seat covers for the period 1950 to August 18, 1952. That other plaintiffs herein have likewise received notices from the defendants herein that defendants propose to assess excise taxes against them for the period 1950 to August 18, 1952 for the manufacture

and sale by them of custom made seat covers, to new and used car dealers.

The defendants are discriminating against affiant and all plaintiffs, as well as retail customers who have purchased their seat covers through a dealer in favor of auto seat cover shops, which during this period of time have been engaged solely with the manufacture of auto seat covers directly for the consumer or the retail customer and not for dealers. That actually there is no legal [36] distinction or basis in law for an excise tax to be assessed against seat cover shops for seat covers made by them for new and used car dealers while sales made by other shops for retail customers are considered exempt from such tax. Actually in those instances where the sale is made to a new or used car dealer, a sale of the seat cover has been made by the dealer to a retail customer and the dealer merely acts as an agent in arranging for the plaintiff to pick up the automobile at the dealer's place of business. In many instances the retail customer of the dealer has in fact visited the place of business of the plaintiffs and made his own selection of the materials, and in many other instances the seat covers have been actually given by the dealer to the purchaser of the automobile in question as a gift and at no charge to the customer.

The regulation made by defendants assessing a tax on custom made to order seat covers for the period prior to August 18, 1952, when the seat covers are sold through a new or used car dealer but exempting the same tax when the retail cus-

tomers (consumer) makes the purchase himself at the place of business of the plaintiffs is a denial to these plaintiffs of the equal protection of the laws afforded to them by the Fourteenth Amendment of the Constitution of the United States, in that it discriminates against plaintiffs in favor of auto seat cover shops who cater only to retail customers, or who have made sales directly to the consumer. Said regulations also discriminates in favor of retail purchasers who make their purchase of seat covers at the place of business of a seat cover shop and discriminates against persons who purchase auto seat covers through a dealer agency, and also discriminates against dealers who purchase seat covers on behalf of retail consumers.

That in 1940 an official regulation was made and published by the predecessors of the defendants known as Regulation 46 S.T. [37] 928 (1940) which provides that glass cut to automobile pattern pursuant to a customer's order and which is installed by the person who cuts such glass is not subject to the manufacturer's excise tax, for the reason that the transaction is deemed to be one involving the sale of labor and material and not a sale of an automobile part or accessory.

The regulation made by the defendants assessing a tax on custom made to order seat covers for the period prior to August 18, 1952 and determining that such seat covers are subject to a manufacturer's excise tax is a denial to these plaintiffs of the equal protection of the laws afforded to them by the Fourteenth Amendment of the Constitution

of the United States, in that it discriminates against plaintiffs in favor of automobile glass shops who cut and install glass for automobiles. That glass for automobiles is in the same merchandise category as seat covers for automobiles and if a seat cover is an accessory within the meaning of Section 3403 of the Internal Revenue Code, a fortiori, glass for automobiles is an accessory. And if a sale of glass cut to an automobile pattern and installed on an automobile constitutes a transaction involving the sale of labor and material and not the sale of an automobile part or accessory by the same reasoning seat cover material cut and installed on the upholstery of an automobile is one involving the sale of labor and material and not the sale of an automobile part or accessory. Your affiant states that to cut, measure, sew and install a custom made set of auto seat covers consumes approximately four hours of the time of an experienced upholstery trimmer. That this labor constitutes the major portion of the cost of a custom made seat cover, involving approximately four hours labor of an employee's time out of an ordinary eight hour operating day. That where the owner of the shop performs this labor it also includes 50% of his overhead for one half of a day [38] is consumed in the one seat cover job. If an employee cuts, sews and installs the seat cover, as well as dismantles the upholstery and replaces the upholstery in the car 50% of the overhead attached to the employee is included in that transaction.

That not one of the plaintiffs prior to August

18, 1952 were at any time notified by the defendants or defendants' predecessors that there was an excise tax attachable to custom made to order covers whether made for new or used car dealers or for retail consumers directly. Affiant states that it was the established usage and custom in the State of California for the automobile upholstery shops not to charge an excise tax on custom made to order seat covers prior to August 18, 1952. That the basis of this usage and custom followed and was as a result of the many opinions, both oral and in writing issued by the defendants and their predecessors to various persons who made inquiry of them concerning such a tax. That this information became common knowledge in the trade and was circulated by word of mouth among the trimmers and by the salesmen of the auto upholstery jobbers.

Affiant's attorney prepared a questionnaire which was mailed by him to all of the plaintiffs in this action submitting to them various questions pertaining to the issues in this case. That included in this questionnaire the following questions were asked of them:

Q. During the period prior to August 15, 1952, did you make and install custom made to order auto seat covers for new or used car dealers?

Q. If your answer to the previous question is "Yes", will you please state whether or not you collected an excise tax on any such seat covers so made by you?

To this last question each and every one of the

plaintiffs replied that no excise tax had been collected by them. [39]

Q. Did you charge an excise tax to the new or used car dealers for any custom made to order auto seat covers, kick pads or car rugs prior to August 15, 1952? To this question all plaintiffs answered "No."

Q. Were you at any time notified by the Bureau of Internal Revenue prior to August 15, 1952, that there was an excise tax on custom made to order seat covers or car rugs or kick pads. To this question all plaintiffs answered "No."

Q. Were you familiar with the custom of auto seat cover trade prior to August 15, 1952, with reference as to whether or not an excise tax was chargeable on custom made to order auto seat covers, car rugs or kick pads? To this question all plaintiffs answered "Yes."

Q. If your answer to the previous question is Yes, that you were so familiar, state whether or not it was the custom in the auto seat cover trade, prior to August 15, 1952, to charge an excise tax to the new or used car dealers for custom made to order auto seat covers, kick pads or car rugs? To this question all plaintiffs replied "It was not the custom."

Q. When was the first time that you learned that an excise tax was chargeable on custom made to order auto seat covers, car rugs or kick pads? To this question all plaintiffs replied "After August 1952."

Q. Would it cause financial hardship to you if

you are required to pay an excise tax for custom made to order auto seat covers, car rugs or kick pads on work performed by you for new and used car dealers prior to the 15th day of August 1952 and going back for the period that you were in business. To this question all plaintiffs answered "Yes."

Q. Do you feel that the imposition of such a tax by the Bureau of Internal Revenue for the work you performed in the manufacture of custom made to order auto seat covers, car rugs and [40] kick pads for the period prior to August 15, 1952 is a fair and just tax? To this question all plaintiffs answered "No."

Q. Do you feel that such a tax imposed upon is a denial of your constitutional rights? To this question all plaintiffs replied "Yes."

Q. In conducting your business for the period prior to August 15, 1952 did you rely upon the established usage of custom made to order auto seat cover business in failing to collect an excise tax for any auto seat covers made and installed by you on new or used cars for dealers for the period prior to August 15, 1952? To this question all plaintiffs replied "Yes."

Q. Did you know that the Excise Tax Division in the City of Los Angeles prior to August 15, 1952 had led various auto seat cover trimmers in this area to understand that there was no excise tax chargeable by them on custom made to order auto seat covers, whether made for new or used car

dealers or retail customers? To this question, all plaintiffs replied "Yes."

Q. Did you rely upon this knowledge? To this question all plaintiffs replied "Yes."

Q. Do you feel that this area should be released from the payment of any excise tax for the period prior to August 15, 1952? To this question all plaintiffs replied "Yes."

Affiant states that neither he nor any of the plaintiffs can now legally enforce payment from their customers of the excise tax now sought to be enforced against them by the defendants. Likewise such rights, if any are barred by the statute of limitations and, additionally, it would be impracticable and too costly to enforce such payment assuming that such claims were not barred. That in the case of affiant, defendants have assessed an excise tax against him in the sum of \$11,973.70. That affiant has collected no part of this tax from his customers. That in [41] order for him to pay this tax he would actually be forced to mortgage his home.

That the defendants have notified other plaintiffs herein that they propose to assess excise taxes against them in amounts running into thousands of dollars. The defendants have notified Eugene L. Lessner, one of the plaintiffs, doing business as Superior Seat Cover Co. that they propose to assess a tax against him in the sum of \$3685.51. That the defendants have notified Richard Lambeth and M. O. Pelter that they are to be assessed a tax in the sum of \$2003.14. That other plaintiffs have received

notices from the defendants that they propose to assess excise taxes against them and that such amounts would run into large sums of money. That if Richard Lamberth and M. O. Pelter are required to pay said tax they would be forced to liquidate their business, as they do not have the money to pay this tax. That the plaintiff Gene L. Lessner is financially unable to pay this tax and it would cause him great financial hardship if he is forced to pay it.

That in equity and in good conscience the defendants should be estopped from now assessing an excise tax against any of the plaintiffs on any sales of custom made to order auto seat covers made by them prior to August 18, 1952. That the defendants have misled the plaintiffs so that plaintiffs did not prior to August 18, 1952 include in their selling price the excise tax on any sales which they made of custom made to order seat covers, whether the sales were made to retail customers or to new or used car dealers.

That on February 25, 1944 one H. G. Barnett, then the Acting Chief of the Miscellaneous Tax Division of the Department of Internal Revenue, addressed a letter to E. W. Cheadle, one of the plaintiffs herein, wherein Mr. Barnett stated that under the ruling of the Commissioner of the Department of Internal Revenue [42] all seat covers made from raw material for immediate installation were not subject to an excise tax. That similar statements were made by the predecessors of the

defendants and their agents to the plaintiffs herein. (Attached as Exhibit E.)

That neither your affiant nor any of the plaintiffs at any time knew that there was any such tax to be charged or collected by them and, in fact, all information and knowledge which plaintiffs received on this subject from the defendants or through letters or regulations made and published by the defendants or from any other source, were all consistently to the effect that there was no excise tax to be charged or collected by them for any automobile seat covers made by them if custom made to order and immediately tailored to the respective cars by them, without regard as to whether the customer was a retail customer or a new or used car dealer. The imposition and enforcement of such a tax, therefore, by the defendants against your affiant or any of the plaintiffs in this action would be an act of oppression and injustice and would cause plaintiffs great financial hardship and distress.

Wherefore, your affiant, on behalf of himself and these plaintiffs, represents as follows:

First: That the defendants and each of them are estopped from assessing an excise tax against these plaintiffs or any of them for any automobile seat covers made by them or any of them for new or used car dealers prior to August 18, 1952, if such seat covers were tailored by them to the respective automobiles and were not placed in stock for future installation.

Second: That the acts of the defendants herein

in seeking to assess or enforce an excise tax against the plaintiffs or either of them, for the period prior to August 18, 1952 for any automobile seat covers made by them for new or used car dealers [43] while at the same time exempting from the payment of such tax any sales made for auto seat cover shops for retail customers during that period of time, denies the plaintiffs and each of them the equal protection of the laws and is contrary to the Fourteenth Amendment of the Constitution of the United States.

Third: That plaintiffs herein were not at any time engaged in business as manufacturers, producers or importers of automobile seat covers, but are and were each respectively engaged in the business of operating as upholstering automobile seat cover shop and are not subject to an excise tax under the provisions of Section 3403 (c) of the Internal Revenue Code, or amendments thereto.

Fourth: That the regulations heretofore made by the defendants herein in seeking to assess or enforce an excise tax against the plaintiffs or either of them on custom made automobile seat cover sales made by them to new or used car dealers during the period prior to August 18, 1952, while at the same time exempting from the payment of such excise tax any sales of automobile glass to new or used car dealers made and installed by automobile glass shops denies the plaintiffs and each of them the equal protection of the laws and is contrary to the Fourteenth Amendment of the Constitution of the United States.

For the foregoing reasons, it is respectfully submitted that the defendants and each of them should be restrained from assessing or from enforcing payment of an excise tax against any of the plaintiffs for the period prior to August 18, 1952, on any sales of custom made to order auto seat covers made by them to new or used car dealers.

/s/ WILLIAM H. MARTIN

Subscribed and sworn to before me this 26th day of October, 1954.

[Seal] /s/ PHILLIP W. SILVER,
Notary Public in and for the County of Los Angeles, State of California. [44]

EXHIBIT "A"

W&E-1032

Modification by the Bureau of Internal Revenue of
Previous Ruling Relative to Custom-Made Seat
Covers, Etc., Effective Date August 18, 1952.

Section 3403(c) of the Internal Revenue Code, as amended, imposes a tax on the sale or use by the manufacturer of parts or accessories for vehicles taxable under subsections (a) and (b) of section 3403 of the Code. Seat covers, tops, door panel covers, and arm rest covers are held to be parts or accessories for automobiles within the meaning of section 3403(c) of the Code, and the manufacturer's sale of such articles is subject to tax at the rate of 8% of the selling price.

It is held that if a manufacturer furnishes the materials and makes automobile seat covers, whether according to pattern or by individually measured jobs, all sales of such covers are taxable under section 3403(c) of the Code, as amended, regardless of whether they are installed by the manufacturer or by other persons.

If, in making an automobile part, door panel, or arm rest, the fabricator simply replaces the covering on the top of the automobile, the door panel or arm rest, such operation is held to be a repair of the article and the amount charged for such repair job would not be subject to the manufacturers' excise tax imposed under section 3403(c) of the Code, as amended. However, if the fabricator makes an entirely new top, door panel, or arm rest, including the frame, from his own materials his sales of such new articles are held to be properly subject to the tax imposed under section 3403(c) of the Code, as amended.

With respect to the basis for tax, section 3441(a) of the Internal Revenue Code provides that the tax to be paid upon sales made at wholesale shall be paid upon the wholesale (i.e., invoice) price, plus any separate charge made for containers, etc., incident to placing the articles in condition packed ready for shipment and for delivery of the shipments. From such adjusted price is to be excluded any expenses actually incurred by the manufacturer (1) in effecting delivery of the articles to the purchasers, (2) for installation of the articles and (3) for insuring the shipments to customers. [45]

EXHIBIT "B"

Treasury Department Internal Revenue Service
Los Angeles 12, Calif.

Office of the Collector
Sixth District of California
In reply refer to MT:M

October 14, 1947

Blackwood's Auto Seat Covers
1565 India Street
San Diego, California

Attention: E. A. Blackwood

Dear Mr. Blackwood:

Reference is made to your letter of October 10, 1947, relative to automobile seat covers.

As the manufacturer of seat covers you are required to keep adequate records on your sales. The manufacturers' tax of 5 percent on your net selling price applies under Section 3403(c) to sales of seat covers from your shelves, made up by you as stock.

If, as it appears, you have car owners bringing in cars requesting you to make to order seat covers from materials you stock, which you install in their cars, no tax applies.

Very truly yours,

Harry C. Westover, Collector
/s/ By Leo L. Reusche
Leo L. Reusche,
Assistance Chief Miscellaneous
Tax Division [46]

“EXHIBIT C”

State of California,
County of Los Angeles—ss.

Rubie Gilbert, being first duly sworn, deposes and says: That he is a Public Accountant licensed to practice in the State of California.

That in April of 1948 he was employed at Mono Auto Seat Cover Company to audit their books. That at that time Mono Auto Seat Cover Company was engaged in the business of manufacturing automobile seat covers for both wholesale and retail and for both new and used cars to the general public as well as the dealers. That when your affiant audited the books of Mono Auto Seat Cover Company he discovered that Mono Auto Seat Cover Company had been paying an excise tax on the full amount of the sale of all the seat covers made by them for both wholesale and retail and, whether to the general public or for a dealer. That affiant, thereupon, telephoned the Internal Revenue Bureau, Excise Tax Division, asked for the person in charge of the office and after being connected, informed this person that he was an accountant; that he was employed by a seat cover firm to audit their books and that he was endeavoring to compute the amount of the excise tax correctly due on seat-cover sales and wanted to obtain information from the Internal Revenue Bureau as to the taxability on various types of seat covers. That your affiant thereupon informed this person and the Internal Revenue Bureau that his client, Mono Auto

Seat Cover Company had been paying a tax on all seat covers made by them whether for retail customers or wholesale customers and whether manufactured, custom-made or ready made, and wanted to know if such tax was properly chargeable on all of these various types of seat covers. That your affiant was informed that there would be no excise tax collectible on any custom made to order seat covers whether made for retail customers or wholesale customers, but that the only tax collectible [47] would be on stock seat covers manufactured and sold, whether wholesale or retail, nor would there be any tax on that portion of the sale which includes installation charge, provided that the installation charge is separately stated; nor would there be any tax on delivery, express or other shipping charges provided such charges were separately stated; also that trade discounts could be deducted from gross sales in computing taxable sales, likewise for cash discounts. That there was specifically no tax on the sale of seat covers which had been purchased ready made from another manufacturer.

/s/ RUBIE GILBERT

Sworn and subscribed to before me this 3rd day of August, 1954.

[Seal] /s/ PHILLIP W. SILVER,
Notary Public in and for the County of Los Angeles, State of California. [48]

EXHIBIT "D"

State of California,
County of Los Angeles—ss.

Louis Lampert, being first duly sworn, deposes and says: That he is a certified public accountant duly licensed by the State of California; that he makes this affidavit at the request of Phillip W. Silver.

Your affiant states that in February of 1950 he was employed by Mr. Phillip W. Silver to audit the books of a business then operated by Mr. Silver under the name of Mono Auto Fabrics. That in the process of auditing these books, your affiant observed that no excise tax was being collected by Mr. Silver or his employees in the manufacture by Mr. Silver of auto seat covers made by him at his factory on custom made to order work and that the only tax then being paid by Mr. Silver was a tax on auto seat covers manufactured by him and shipped to the various customers in a package. Your affiant thereupon discussed this matter with Mr. Silver and asked Mr. Silver if he was relying upon any opinion or rule or bulletin issued by the Internal Revenue Bureau in failing to collect a tax on the custom work being done by him. That Mr. Silver informed your affiant that the previous accountant in your affiant's employ had called the Internal Revenue Bureau at his suggestion to obtain an opinion from the Excise Tax Division of the Los Angeles Internal Revenue Bureau as to whether a tax was collectible or payable on custom

made to order auto seat covers and that this previous accountant, a man named Rubie Gilbert had been informed by the Los Angeles Excise Tax Division of the Internal Revenue Bureau that an excise tax was not collectible on custom made to order auto seat covers, whether made for dealers or the general public, and that it was on the basis of this opinion, that Mr. Silver was not collecting an excise tax on custom made to order auto seat covers. That Mr. Silver suggested to your affiant that he call the Internal Revenue [49] Bureau to verify the previous opinion that his former accountant had received. That thereupon Mr. Silver did call the Excise Tax Division of the Los Angeles Internal Revenue Bureau in the presence and hearing of your affiant and that he asked to be connected with the head of the Excise Tax Office. That after Mr. Silver spoke to the person who responded to the telephone call, your affiant took over the phone and thereupon engaged in the following conversation.

Your affiant introduced himself by stating his name, his occupation and that he was a certified public accountant and that he was auditing the books of Mono Auto Fabrics and that he was interested in learning whether an excise tax was chargeable and payable on custom made to order auto seat covers. That the person who spoke to your affiant stated that they had received word from Washington that there was no tax to be collected on custom made to order seat covers, but that the only excise tax to be collected was on the whole-

sale manufacture of auto seat covers in the package, that is to say, box covers or covers that were shipped out for installation by the customers themselves, such as seat covers being shipped to a car dealer where the car dealer maintains his own installation facilities, but that any auto seat covers manufactured and installed on the premises and on the car whether the customer be a new or used car dealer or a retail customer, that there would be no excise tax chargeable and payable. Your affiant thereupon asked the person to whom he was speaking if the local department had an official bulletin which could be made available to him; that the person replied they did have a bulletin from Washington to cover their instructions on this matter, but that such a bulletin was not available for distribution. Your affiant thereupon asked the party to whom he was speaking what her capacity was with the Internal Revenue Bureau, Excise Tax Division, and the person replied that she was in charge of the Excise Tax Division of the Los Angeles office. Your affiant thereupon stated that he would advise his [50] client there was no tax due from him on custom made auto seat covers and that he would make his return accordingly.

That your affiant continued in the employ of the Mono Auto Fabrics until he discontinued business operations in September of 1953. That the first time your affiant learned that there was a tax collectible on custom made to order auto seat covers was some time in the latter part of August 1952 or the early part of September of that year, at which time Mr.

Silver showed him a letter which had been received by him on or about that date, in which a new interpretation was made by the Internal Revenue Bureau of the Los Angeles office to the effect that an excise tax would thereafter be due and collectible on custom made to order seat covers. That upon receipt of this letter your affiant told Mr. Silver that henceforth he should commence collecting excise tax on any custom auto seat covers inasmuch as he would be required to remit such excise taxes to the Internal Revenue Bureau.

/s/ LOUIS LAMPERT

Subscribed and sworn to this 12th day of August, 1954.

[Seal] /s/ PHILLIP W. SILVER,
Notary Public in and for the County of Los Angeles, State of California. [51]

EXHIBIT "E"

Treasury Department, Internal Revenue Service
Los Angeles, Calif. 12

Office of the Collector February 25, 1944
Sixth District of California
In Replying Refer to MT:M

Mr. George L. Chradle,
1189 East Anaheim,
Long Beach, California

Dear Mr. Chradle:

Reference is made to your letter of February 11,

1944, requesting to be advised concerning your liability to the manufacturer's excise tax on auto parts. You state that you manufacture seat covers and are paying tax on the full amount for making and installing same.

The Commissioner of Internal Revenue has held that repair shops which made up top covers, side curtains, etc. from raw material for immediate installation are not liable for tax on such jobs, but where the articles are made up and placed in stock, tax attaches to the sale thereof.

If you manufacture seat covers and keep them in stock, tax will attach to your sale thereof based upon your established wholesale selling price, that is, if you sell at retail, the tax will be based upon the wholesale selling price of similar seat covers.

The charge for installation, if billed separately, may be excluded in computing the tax.

Very truly yours,

Harry C. Westover, Collector

By H. G. Barnett,

Chief Miscellaneous Division [52]

[Endorsed]: Filed Oct. 29, 1954.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading the verified complaint of the plaintiffs in this action and the affidavit of the plaintiff, and good cause appearing therefor,

It is hereby ordered that the defendant, Robert A. Riddell, District Director of the Collector of Internal Revenue for the Los Angeles District, appear before this Court in the Courtroom of Department 1 on the 15th day of November, 1954, at the hour of 10 a.m., then and there to show cause, if any he have, why he, his agents, servants, employees and attorneys should not be enjoined and restrained during the pendency of this action from [53] assessing or proceeding with the assessment or enforcement of any taxes assessed against the plaintiffs or either of them, for the period prior to August 18, 1952 under Section 3403 of the Internal Revenue Code of the United States and any amendments thereto.

Dated this 3rd day of November, 1954.

/s/ BEN HARRISON,
Presiding Judge of the United States District
Court [54]

[Endorsed]: Filed Nov. 3, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION

To the defendants above named and to the United States Attorney:

Please take notice that the plaintiffs will on the 15th day of November, 1954, at the hour of 10 a.m. before the Honorable Peirson Hall move the Court

for a preliminary injunction in the above entitled cause, enjoining the defendants, their agents, servants, employees and attorneys from assessing or proceeding with the assessment, or from seizing, taking by distraint and selling any of the goods, chattels, effects, including stocks, securities, bank accounts, evidences of debt or other personalty and real property of the above named plaintiffs. Said [55] motion will be made and based upon the complaint of the plaintiffs, the affidavit of William H. Martin, Points and Authorities and this Notice of Motion.

/s/ PHILL SILVER,

Attorney for Plaintiffs [56]

[Endorsed]: Filed Nov. 3, 1954.

[Title of District Court and Cause.]

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Statement of the Issues Involved

Whether plaintiff can maintain an action to enjoin a proposed assessment of Federal excise taxes in the face of the express provisions of Section 3653 of the Internal Revenue Code (1939) and Section 2201 of Title 28, U.S.C.A.

* * * * * [57]

LAUGHLIN E. WATERS,
United States Attorney
EDWARD R. McHALE,
Assistant U.S. Attorney
Chief, Tax Division
EUGENE HARPOLE,
Special Attorney, Internal
Revenue Service

/s/ By EDWARD R. McHALE,
Attorneys for Defendants [71]

EXHIBIT "A"

Revenue Agent's Proposed Adjustments
Affecting Tax Liability

Name of taxpayer: Martin's Auto Trimming, Inc.

Address of taxpayer: 1243 So. Alvarado, Los
Angeles, California.

Kind of tax: Mfgr's Excise; period 8-1-50 to
8-31-52.

At the time the proposed adjustments affecting
your tax liability were discussed, you did not agree
to the items marked (*) listed below:

*Additional manufacturers excise tax in the
amount of \$11,917.73 unreported on the manufac-
ture and sale of custom made seat covers.

You are advised that you may present your ob-
jections to the proposed changes at an informal con-
ference which may be requested within the next 10
days by telephoning or writing to the following
address:

Group Supervisor: A. A. Underhill; Telephone No.: MI 8111, Ext. 700.

Address: 1721 Federal Building.

If you decide to accept the findings as set out above, please advise. If no informal conference is requested, an examination report will be mailed to you by the District Director of Internal Revenue.

Aug. 18, 1954.

C. C. Freed,
Internal Revenue Agent

Received copy: Wm. H. Martin (signed). [72]

EXHIBIT "B"

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

State of California,
County of Los Angeles—ss.

Alvin A. Underhill, being first duly sworn, deposes and says:

I am Group Supervisor of the Excise Tax Group of the Audit Division of the District Director's Office of the Internal Revenue Service for the Southern District of California, with my post of duty at the City of Los Angeles, State of California. In the course of my duties as Group Supervisor, I assign all excise tax independent audits to Internal Revenue agents making such audits who work under my supervision. All reports pursuant

to audits assigned to these agents are forwarded to me for approval.

In the course of my duties as Group Supervisor of the Excise Tax [73] Group, I have recourse to the records pertaining to excise tax audits assigned by me. After examining such records I can assert that there are only twelve cases where excise tax audits have been made to determine whether the taxpayer is liable for additional excise taxes imposed by the provisions of Section 3403(c) of the Internal Revenue Code (1939). Such audits have resulted in the issuance of a revenue agent's proposed adjustments affecting tax liabilities, also called notices of proposed assessments, but in not any of these twelve cases has an actual assessment been made. In at least seven of these twelve cases the amounts proposed to be assessed are less than \$2,000.00. In approximately six other cases, excise tax assessments have been made, but only after an agreement was reached between the agent and the taxpayer as to the correct excise tax liability.

The plaintiff seeking the preliminary injunction in this case is one of the twelve taxpayers referred to above and in the same position as the other eleven taxpayers. All of these taxpayers are afforded the right to present their objections to the proposed assessments at an informal conference which may be requested within ten days following the receipt of the notice of proposed assessment. By letter to the Director of Internal Revenue, dated August 20, 1954, plaintiff requested that its right to a conference be extended for a period of thirty

fidavit in reply to a memorandum filed by the defendants herein in opposition to plaintiffs' motion for preliminary injunction.

In defendants' memorandum the statement appears, "It had been the consistent position of the Internal Revenue Service, however, that the sale of seat covers similarly produced to a dealer in new or used automobiles is not a sale for consumption but one for resale and that the tax attaches to the manufacturer's sale thereof". This statement is not supported by any facts in defendants' memorandum and is contrary to the facts as they exist. [76]

For 20 years it was the position of the Internal Revenue Department in the City of Los Angeles as well as throughout the United States that there was no excise tax applicable to any automobile seat covers custom made to order, regardless as to whether they were made for retail customers directly or for used or new car dealers. Actually, it would make no difference whether the seat covers were made for a retail customer directly or for a new or used car dealer. The tax in question is an alleged manufacturers tax. When an automobile upholstery seat cover shop makes a custom set of seat covers for a dealer that fact does not change him into a manufacturer, if he were not a manufacturer to begin with.

The true facts are that it was not until August, 1952, that the Internal Revenue Service, for the first time indicated that they regarded the excise tax applicable to sales made to new and used car

dealers and that the tax would be enforced retro-active to any sales made by upholstery shops to new and used car dealers, but the Internal Revenue Department stated in their bulletin issued August 19, 1952, S.T. 944, that this new interpretation, which they called a ruling, would not be applied retro-actively with respect to sales of seat covers produced for the consumer, but would apply it retro-actively to sales made to dealers in new and used cars, and although in S.T. 944 the collector does say that the sales by a manufacturer of seat covers produced according to individual design and measurement to a dealer in new and used cars was held to be not effected by the ruling of August 18, 1952, as such sales were deemed taxable prior to the ruling and the tax was considered to continue to attach as in the past to such sales this is a self-serving declaration unsupported by any evidence either as presented in defendants' memorandum or otherwise, and directly contrary to the evidence presented in the plaintiffs' affidavits.

In plaintiffs' affidavit your affiant has set forth reports made to him by Mr. Herbert G. Barnett and it is to be noted [77] in the letter issued and signed by Mr. H. G. Barnett, under the title of Harry C. Westover, Collector, that Mr. Barnett specifically made no distinction as to sales made to individuals and sales made to dealers, and stated that seat covers made from raw materials for immediate installation are not liable for tax on such jobs. This letter, verbatim, reads as follows:

"Treasury Department, Internal Revenue Service,
Los Angeles, Calif. 12

Mr. George L. Chradle, Feb. 25, 1944
1189 East Anaheim, Long Beach, California

Dear Mr. Chradle:

Reference is made to your letter of February 11, 1944, requesting to be advised concerning your liability to the manufacturer's excise tax on auto parts. You state that you manufacture seat covers and are paying tax on the full amount for making and installing same.

The Commissioner of Internal Revenue has held that repair shops which make up top covers, side curtains, etc., from raw materials for immediate installation are not liable for tax on such jobs, but where the articles are made up and placed in stock, tax attaches to the sale thereof.

If you manufacture seat covers and keep them in stock, tax will attach to your sale thereof based upon your established wholesale selling price, that is, if you sell at retail, the tax will be based upon the wholesale selling price of similar seat covers.

The charge for installation, if billed separately, may be excluded in computing the tax.

Very truly yours,

Harry C. Westover, Collector

/s/ By H. G. Barnett,

Chief Miscellaneous Division"

In affiant's original affidavit, a conversation he

held with Mr. Barnett is set forth and in that conversation affiant has alleged that Mr. Barnett informed him there was no excise tax on custom made to order seat covers. In this conversation affiant had explained to [78] Mr. Barnett that he was engaged in the automobile upholstery business; that the major part of his business was for new and used car dealers. That the local office of the Collector of Internal Revenue made no distinction between sales made to new or used car dealers or to retail customers is further corroborated by the affidavit of Rubie Gilbert, an accountant, whose affidavit marked Exhibit "C" is attached to affiant's original affidavit on file, and in that affidavit Rubie Gilbert stated that he was informed by the Los Angeles Internal Revenue Bureau that there was no excise tax collectible on any custom made to order seat covers, whether made for retail customers or wholesale customers, and that the only tax collectible would be on seat covers manufactured and placed in stock. Affiant was further corroborated by Louis Lampert, a certified public accountant, whose affidavit is on file in this case and is attached to your affiants original affidavit and made a part thereof and in that affidavit made by Louis Lampert, Louis Lampert states that he was informed by the head of the excise tax office in the Los Angeles Internal Revenue Bureau that they had received word from Washington that there was no tax to be collected on custom made to order seat covers and that the only excise tax to be collected was on the wholesale manufacturer of auto seat covers in the package and that

any auto seat cover manufactured and installed on the premises, whether the customer be a new or used car dealer, would not be subject to excise tax.

Affiant is further corroborated by a letter dated October 14, 1947, sent under the title of Harold C. Westover, Collector, signed by Leo L. Reusche, identified as Assistant Chief Miscellaneous Tax Division, in which Mr. Reusche specifically stated that if car owners bringing in cars request him to make to order seat covers from materials which he stocks, and which he installs in their cars, no tax applies. This letter is attached to affiant's original affidavit, marked Exhibit "B", and it is to be noted that no [79] distinction is made by Mr. Reusche as to sales made to car owners who may be individuals or car owners who may be dealers.

As a matter of fact, since this action was filed, a letter was issued by R. J. Bopp, Chief, Excise Tax Branch in Washington, sent to National Association of Auto Trim Shops, in which Mr. Bopp specifically says that he agrees with a decision made by the United States District Court for the Southern District of Florida, that the distinction sought to be invoked by the Collector of Internal Revenue against the trim shops in the Southern District of Florida on sales made by them to dealers was an unwarranted distinction. An exact copy of this letter is attached hereto and made a part of this affidavit. That in the case referred to by Mr. Bopp in his letter, the District Court for the Southern District of Florida rendered a judgment that an excise tax assessed by the Collector of Internal Revenue

against an auto upholstery shop for sales made to dealers as distinguished from sales made to consumers was improperly assessed and that no distinction between general customers and dealers should be drawn. That a copy of the Findings of Fact and Conclusions of Law in that action are attached hereto and made a part of this affidavit.

If there was any ruling or bulletin in existence prior to August 18, 1952, declaring that sales made to dealers were subject to excise tax prior to August 18, 1952, this ruling was unknown to any official in the Los Angeles office of the Collector of Internal Revenue and the fact remains that for 20 years prior to August 18, 1952, no effort was made by the Collector of Internal Revenue in Los Angeles to collect a tax for any sales made by the upholstery shops to dealers. Actually, on sales made by the upholstery shops to the dealers, in many instances, especially to the used car dealers, the dealers themselves were the owners of the cars. With respect to the new cars, the dealers in many instances only act as intermediaries, but regardless of the mechanics of the sale the sewing of a [80] set of seat covers by the upholstery shop for a dealer could no more convert the upholstery shop into the status of a manufacturer than could the sewing of a suit of clothes by a tailor for a store, whether as a practice or an accommodation or otherwise, convert the tailor into the category of a manufacturer.

The letters attached to affiant's affidavits clearly indicate that the only distinction the Collector of Internal Revenue was concerned with was whether

the seat covers were made up for stock, placed on shelves and boxed, which they concluded placed the seat covers in the category of manufactured seat covers for resale and conversely it appears from these letters and the statement shown that the Treasury Department regarded custom made to order seat covers as constituting a sale of labor and exempt from the excise tax.

It is to be noted that the defendants herein have completely failed to dispute affiant's contention that this tax is a manufacturers tax and was never intended to be applicable to persons other than manufacturers. As pointed out in the original affidavit, Section 3403(c) of the Internal Revenue Code, speaks of a tax on sales made by the manufacturer. In all the bulletins issued by the defendants they speak of transactions involving a manufacturer. In the letters issued by the various heads of the Excise Tax Division, they speak of manufacturers. Your affiant asks the court to take cognizance of the fact that manufacturers operate on a mass production scale. They produce seat covers in volume. They manufacture the seat covers according to patterns, wrap them and box them and ship them out to other stores or distributors. Transactions engaged in by affiant and by the various plaintiffs in this case, in each and every instance involved a single individual transaction in which the cushions and the back rests of the automobile would be removed from the car; the seat cover material would be laid on the cushions and on the back rests and the material cut to the contours [81] of the upholstery, then sewn

with appropriate facing material, and immediately installed on to the car. There is thus a clear distinction between a seat cover made in this manner, which certainly cannot be considered manufactured by a manufacturer, and seat covers made in mass production, through patterns with multiple cutting and mass production sewing techniques, boxed and made into the category of a ready made seat cover.

It is respectfully submitted by your affiant that no valid basis exists to place these plaintiffs into the category of manufacturers and subject them to a manufacturers excise tax.

Affiant states that defendants are seeking to collect a tax from plaintiffs on non-taxable sales. That Martin's Auto Trimming, Inc., does not have any excess funds on hand to pay this tax; that the corporation has actually operated at a loss during the current year; that it does not have any borrowing capacity; that if the defendants insist upon payment in full, the corporation does not have the funds to pay such a tax, nor does it have the financial ability to raise this money. That the imposition and enforcement of this tax would destroy plaintiff's business and inflict loss upon the corporation for which it would have no adequate remedy at law.

[Seal] MARTIN'S AUTO TRIMMING, INC.

/s/ By WILLIAM H. MARTIN,
President

State of California,
County of Los Angeles—ss.

On this 30 day of December, 1953, before me, a

Notary Public, personally appeared William H. Martin, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same on behalf of the corporation, and acknowledged to me that such corporation executed the same, and that he is the President of the corporation.

In Witness Whereof I have hereto set my hand and affixed my seal the day and year first above written.

[Seal] /s/ PHILL SILVER [82]

Copy of letter from R. J. Bopp, Chief.
Excise Tax Branch

National Association of Auto Trim Shops
865 Broadway, New York 3, New York

Attention: Mr. William J. Allen

Gentlemen:

This is in reply to your letter of August 25, 1954, addressed to the Commissioner of Internal Revenue, and to your letters, each dated August 27, 1954, addressed to the Secretary of the Treasury, and to the General Counsel of the Treasury, which have been referred to this Service for reply. A copy of the "Findings of fact and conclusions of law" by the District Court of the United States for the Southern District of Florida, Miami Division, in the case of Johnnie & Mack, Inc., vs. The United States of America, and John S. Feller t/a Johnnie

& Mack Body Shop vs. United States, was enclosed with your letter.

You state that at the present time there exists much confusion and misunderstanding as to the effect of the foregoing decision on the auto trim shops throughout the United States, and request that clarification of the decision be made.

In the above case the taxpayers were in the business of making automobile seat covers to order and they sold a small fraction of their product to car dealers. Excise tax was assessed against them on the seat covers sold to dealers. The District Court held that as the taxpayers sold each seat cover to an individual order, no distinction between general customers and dealers should be drawn. The court held, therefore, that the tax was improperly assessed. The periods covered in this suit were January 1947 to February 1949 and March 1949 to October 1950.

Section 3403(c) of the Internal Revenue Code of 1939 imposes a tax on the sale or use by the manufacturer of parts or accessories for the articles named under subsections (a) and (b) of section 3403 of the Code. Seat covers for automobiles are held to be parts or accessories for automobiles within the meaning of section 3403 (c) of the Code, and the manufacturer's sale of seat covers is subject to the tax imposed under the section of the law.

On August 18, 1952, S.T. 944 modifying previous rulings with respect to the taxability of automobile seat covers was published in the Internal Revenue Bulletin. It was held that where a manufacturer

furnishes the material and produces automobile seat covers for the consumer thereof, according to individual design and measurement, the sale by the manufacturer of such seat covers is taxable under section 3403 (c) of the Code, regardless of whether they are installed by the manufacturer or by other persons. The effective date of S.T. 944 is August 18, 1952, the date of its publication.

The taxability of custom-made seat covers upon order of car dealers was not established for the first time by S.T. 944. To the contrary, in a series of rulings issued in the past several years, [83] we have uniformly ruled that seat covers so made are taxable. Our position on the matter is clearly indicated in the second paragraph of S.T. 944, which reads as follows:

"The Bureau has issued rulings heretofore that the only circumstances under which the tax does not apply to sales of seat covers by a manufacturer, is where the seat covers are individually designed, cut, tailored, and fitted by the manufacturer to the automobile belonging to the person who contracts for the performance of such operation, and such person is the consumer of the seat covers. Such rulings provided, however, that the sale of seat covers, similarly produced, to a dealer in new or used automobiles is not a sale for consumption but one for resale, and that the tax attaches to the manufacturer's sale thereof."

In fact, S.T. 944 was issued to announce the rule that the tax applies to all custom-made seat covers, regardless of the class of customer for whom made.

However, since seat covers made for consumers (as distinguished from car dealers) had not theretofore been held taxable, the ruling was made nonretroactive in its application to such seat covers. But such limitation upon the retroactive application of the ruling was not intended to affect the taxability of seat covers for car dealers, in respect of which our position was not changed by the ruling.

We agree with the court's conclusion of law that the distinction drawn between sales of seat covers made to order of individual automobile owners and new or used car dealers is an unwarranted distinction. It is on this basis that our published ruling S.T. 944 is predicated. However, we cannot agree with the district court's view that sales of seat covers are sales of labor and material for this view would eliminate completely the tax that we believe the law intended to impose. Nor can we acquiesce in the court's conclusion of law that because a distinction was made in the particular case between sales of seat covers to automobile dealers and sales to consumers, no tax was due on sales to dealers. In view of the importance of the matter and the reasons cited, it should be apparent why we feel compelled to adhere to our position until the matter has been tested by litigation in other cases.

Very truly yours,

R. J. Bopp,

Chief, Excise Tax Branch [84]

Copy

Johnnie & Mack, Inc., a Florida corporation,
Plaintiff vs. The United States of America, De-
fendant, John S. Feller, an individual t/a Johnnie
& Mack Body Shop, Plaintiff vs. The United States
of America, Defendant.

In the District Court of the United States for
the Southern District of Florida, Miami Division.
Nos. 5024-M Civil, 5023-M Civil. June 16, 1954.

Manufacturers' excise taxes. Automobile parts
and accessories.—Taxpayers were in the business of
making automobile seat covers to order, and sold
a small fraction of their product to car dealers. The
Commissioner assessed an excise tax for the seat
covers sold to dealers. The District Court held that
as taxpayers sold each seat cover to an individual
order, no distinction between general customers and
dealers should be drawn. Therefore the Court held
that the tax was improperly assessed.

Findings of Fact and Conclusions of Law

Findings of Fact

Holland, District Judge:

1. The Court has jurisdiction of the parties and
the subject matter.

2. The plaintiffs are John S. Feller, an Individ-
ual T/A Johnnie & Mack Body Shop in No.
5023-M-Civil, and Johnnie & Mack, Inc., a Florida
corporation, in 5024-M-Civil.

3. The plaintiff Johnnie & Mack, Inc., and its

predecessor John S. Feller operated and operates, among others, a seat cover business in Miami, Florida.

4. Seat covers are made to individual order after selection of fabrics by the purchaser, regardless of whether the purchaser is an individual automobile owner or is a new or used automobile dealer.

5. The automobile dealers are to be regarded under the applicable tax law as consumers of the product sold.

6. The sales of seat covers are sales of labor and materials and are not sales of seat covers as accessories.

7. The respective plaintiffs have paid a deficiency manufacturer's excise tax on seat covers in the following amounts: John S. Feller, in 5023-M-Civil, \$392.28, Johnnie & Mack, Inc., in 5024-M-Civil, \$477.03, calculated on the basis of one and one-half per cent of the gross sales as being sales to dealers.

8. The taxes assessed and collected by the defendant, United States, were improperly assessed and collected.

Conclusions of Law

1. The alleged taxable sales here involved, being one and one-half per cent of the total gross sales indicates that the defendant regarded the sales to individuals as being sales of seat covers not manufactured in such a manner as to be taxable under 26 U.S.C.A., Section 3403 (c) as amended and applicable to this case, and the Court concludes as a

matter of law that the distinction drawn by the defendant regarding the one and one-half per cent of the total gross sales, which represented sales to dealers of used and new automobiles, was an unwarranted distinction.

2. The Court concludes that the respective plaintiffs should have and recover the amounts as agreed in the stipulation between the parties.

3. Costs of this action should be taxed by the Clerk against the defendant.

4. A judgment should be drawn conforming to these findings and submitted to the Court for signature. [85]

Acknowledgment of Service attached. [86]

[Endorsed]: Filed December 31, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF EUGENE L. LESSNER

State of California,
County of Los Angeles—ss.

Eugene L. Lessner, being first duly sworn, deposes and says:

That he is one of the plaintiffs in the above entitled case. That there has been served upon him a notice of a proposed assessment for excise taxes for custom made to order seat covers made by him for new and used car dealers prior to August 18, 1952, in the sum of \$3,685.51.

Your affiant states that he did not collect any portion of the excise tax in question; that he does not have the funds to pay these excise taxes. That he had been led to believe that there was no excise tax chargeable on custom made to order seat covers, [87] whether made for dealers or for retail customers. That your affiant is not a manufacturer, but that all seat covers made by him were individually made on a custom made to order basis and installed on the respective cars for which the seat covers were made.

That if the defendants would enforce payment of this tax against affiant, such enforcement would destroy his business and inflict loss upon him, for which he would have no adequate remedy at law.

/s/ EUGENE L. LESSNER

Subscribed and sworn to before me this 29th day of December, 1954.

[Seal]

/s/ PHILL SILVER,

Notary Public in and for said

County and State [88]

Acknowledgment of Service attached. [89]

[Endorsed]: Filed December 31, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF KENNETH SORENSEN

State of California,
County of Los Angeles—ss.

Kenneth Sorensen, being first duly sworn, deposes and says:

That he is one of the plaintiffs in the above entitled case. That there has been served upon him a notice of a proposed assessment for excise taxes for custom made to order seat covers made by him for new and used car dealers prior to August 18, 1952, in the sum of \$1,789.51.

Your affiant states that he did not collect any portion of the excise tax in question; that he does not have the funds to pay these excise taxes. That he had been led to believe that there was no excise tax chargeable on custom made to order seat covers, [90] whether made for dealers or for retail customers. That your affiant is not a manufacturer, but that all seat covers made by him were individually made on a custom made to order basis and installed on the respective cars for which the seat covers were made.

That if the defendants would enforce payment of this tax against affiant, such enforcement would destroy his business and inflict loss upon him, unless affiant was successful in borrowing money to pay this tax.

/s/ KENNETH SORENSEN [91]

Acknowledgment of Service attached. [92]

[Endorsed]: Filed December 31, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF PHILL SILVER IN REPLY
TO DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMIN-
ARY INJUNCTION

State of California,
County of Los Angeles—ss.

Phill Silver, being first duly sworn, deposes and says:

That he makes and files this affidavit in reply to a memorandum filed by the defendants herein in opposition to plaintiffs' motion for preliminary injunction. Affiant states that he is the attorney of record for the plaintiffs.

That defendants have raised the issue that plaintiffs have not exhausted their administrative remedies and therefore should be denied the injunctive relief prayed for. Defendants affidavit of Alvin A. Underhill alleges that there are only 12 cases where excise tax audits have been made.

Affiant states that prior to the commencement of this action [122] he had a telephone conversation with the above mentioned Alvin Underhill. That your affiant informed Mr. Underhill that he represented the California Auto Trimmers Association. That the association was composed of practically all the trim shops in the State of California and that your affiant had been employed to represent

all trim shops in any excise tax assessment. Affiant stated that many of the trim shops were being audited and handed proposed assessments; that they were being greatly inconvenienced and frightened by the prospect of being called upon to pay a tax which they had not collected and which they had been led to believe was not chargeable. Affiant asked Mr. Underhill if one case could be followed through before him, as a test case; that that case would be followed through all of the channels provided for tax appeal in the event he overruled the objections thereto. That Mr. Underhill stated to him that he had no authority to enter into such an agreement; that he would have to proceed against each trim shop individually with audits and assessments and that each assessment would be handled separately.

Your affiant informed Mr. Underhill that letters had been sent by the Office of the Collector to several of the trim shops advising them that there was no excise tax on custom made seat covers; also that affiant had obtained affidavits from several accountants reciting that they had been informed by the Collector's Office that there was no excise tax on custom made seat covers, whether made for retail customers or dealers.

Affiant further stated to Mr. Underhill that at no time prior to August, 1952, were any of the trim shops in California ever informed that there was an excise tax payable from them on custom made seat covers; that none of them had ever collected any such tax, and that a tax imposed now would drive

many of them out of business. That Mr. Underhill stated that he had received instructions from Washington to undertake an audit on all trim shops in this area, to determine what sales had been made to dealers and to make assessments [123] against all such trim shops and that he would have to proceed with these audits.

Affiant states that the California Auto Trim Association is composed of 185 members; that this action is brought on behalf of all of said members. Affiant has in his possession letters signed by 81 members authorizing affiant to prosecute this suit on their behalf; that the remaining members have authorized this action through motions of their board of directors. That with but one or two exceptions, all of the trim shops in question have made seat covers for dealers, prior to August, 1952, and would be subject to audit if carried on by the defendants. That this procedure, if followed through by the defendants, would require each trim shop to make and file objections, pleading abatement, or pay the tax and file claim for refunds. That if this procedure is followed there will be a multiplicity of claims, hearings and proceedings, with a tremendous amount of time consumed not only of the employees of the defendants but also as to each and every trim shop. That if the administrative officers overrule the objections of the individual trim shop owners, eventually it would lead to a multiplicity of suits in the Federal Court, wherein each shop owner would be seeking legal action either by restraint or refund. That hundreds of hours will be consumed in going

over and over the identical legal questions and objections in each case.

That Mr. Underhill informed your affiant that "his hands were tied"; that actually, he personally had no authority to overrule Washington or the matter of assessing the tax; that such a decision would actually have to come from some one "higher in authority than he".

Your affiant states that this action for injunctive relief was commenced by him after he was informed by Mr. Underhill that he had no authority to sustain the objections, if any, made to the tax, and that he intended to make an assessment regardless of the legal [124] objections which affiant had disclosed to him. That it would be a useless formality to require affiant to appear before Mr. Underhill and present the proposed objections.

That there are a number of Constitutional questions as well as questions of legal interpretation requiring the opinion of the courts. That the amount involved runs into many thousands of dollars, affecting not only the 185 members of the California Auto Trim Shops, but other non-member trim shops, of which there are at least 1500.

Mr. Underhill states that in seven of the audits already made the tax assessments are less than \$2,000.00, which assumes that five are over \$2,000.00. Affiant states that many of the trim shops in question are small shops operated by the owners themselves, and in some instances with a helper. That many of these small shop owners are actually operating with a small working capital and do not have

the funds to employ counsel and pursue separately an action through the courts to obtain a decision on the merits of their tax liability. That many of these shop owners do not have the money to pay the tax even if the amount is less than \$2,000.00, and that if they are forced to pay the tax, would be required to exhaust all or the greater part of their capital. That many of them, if faced with a tax of sizeable amounts, would actually close their business, as they would have no money to continue to operate. That if tax liens are filed against them, those that are unable to pay the tax would be immediately denied any further credit by the wholesalers and could not continue to operate without such credit.

That great confusion, loss of time, loss of money and even complete loss of businesses would result to many of them if the defendants proceed with tax assessments and enforcement. That plaintiffs have brought this class action on behalf of all the trim shops and thus, in one action a speedy determination of the rights of all the parties hereto will be had. That it would be in the interest and furtherance of justice to permit this class action to proceed. [125]

Section 3448 of the Internal Revenue Code provides for penalties of 6% per annum from the time when the tax became due until paid. Section 3612 provides for a penalty of 25% of the amount of the tax in case of any failure to make and file a return within the time prescribed by law, or in lieu thereof, additional penalties of 5% for each additional 30 days, or fraction thereof, not to exceed

25%. Section 2707 provides that any person who fails to pay, collect, and pay over the tax shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax not paid. Section 316.95 provides that any person who wilfully fails to pay any tax due, file or return is subject to a fine of \$10,000.00, or imprisonment, or both.

That attached hereto, marked Exhibit "A", is a list of the members of the California Auto Trim Shops who have individually, in writing, authorized this suit to be prosecuted on their behalf.

That the plaintiffs herein apparently therefore are subject to the various penalties provided above upon their failure to pay the excise tax assessment. The imposition of such penalties, in the case of *Allen vs. Regents*, 304 U.S. 439, was held to be those extraordinary circumstances which justify resort to equity.

Affiant states that the defendants in this case seek to make a distinction on the sales made by the plaintiffs to dealers, on the ground that such a sale contemplates a further re-sale by the dealer. In further answer to this contention in the affidavit of William H. Martin, it is specifically alleged that in many instances, on sales made by the plaintiffs to the dealers, especially to the used car dealers, the dealers themselves were the owners of the cars. (Page 5, line 29, Affidavit of William H. Martin in Reply to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction). This identical issue was made before the United States Treasury

Department by the Automobile Glass Dealers of Southern California, in which they contended that glass sold to a dealer as distinguished from sales made [126] to the retail customers, should not be subject to the excise tax and that there should be no distinction between a consumer and a dealer.

That attached hereto, marked Exhibit "B", is a copy of a letter addressed to Mr. Paul R. Rioth, President of the Harbor Area Auto Glass Dealers, signed by Charles J. Valaer, Deputy Commissioner of the office of the Commissioner of Internal Revenue, rendering an official rule that a sale to any patron of a glass shop, whether a consumer or a dealer, is exempt from excise tax.

That the acts of the defendants in this case, wherein they seek to impose a tax on sales made to dealers of custom made seat covers while at the same time exempting from excise tax glass sold to dealers, is a denial of the equal protection of the laws and of the Fourteenth Amendment, as applied to these plaintiffs. That the cases in support of those principles of law are set forth in the plaintiffs' Points and Authorities being filed concurrently herewith.

/s/ PHILL SILVER

Subscribed and sworn to before me this 30th day of December, 1954.

[Seal]

/s/ ARTHUR J. CROWLEY,

Notary Public in and for said
County and State [127]

EXHIBIT "A"

A. A. Alvarado, H. S. Austin, C. L. Barlow, John H. Belk, Earl H. Belk, Jimmy S. Benway, Charles E. Barga, Chester W. Bollinger, Fred Buckles, G. Byland, Bert Buckmaster.

George Correa, Angelo Conforti, E. W. Cheadle, K. J. Charles, D. L. Crocker, Rod Curet.

R. Durbin and Marvin Castellan, W. S. Daniels, Chester Z. Diemer, Lillian Domrose.

Jess D. Elliott, Fred Fauth, Pat. H. Filbin, Albert Garca, Jules Goldfaden, H. C. Geargain, Arthur Gonzalez, Joe T. Grounds, Henry C. Gutsch.

Warren J. Hawkes, Russell C. Hockensmith, Ina J. Herring, Herman's Furniture & Uph., Howard Gelborn, Kenneth W. Houston, John A. Jones, Kenneth C. Keyes, Oliver Kieffer, Andrew Klein, G. Koch.

Keith C. Lissner, Howard Laurain, Eugene L. Lessner, Sam Latt, Edw. P. Lauer.

W. H. Martin, R. F. Moata, M. T. Menzie, Herbert A. Merkel, Geo. W. McGrath, Junius N. Martin, Edgar G. Metcalf, Larry J. Meyers.

Stanley P. Nelson, Donald E. Norton, Alec Palott, Jim Perkins, Ed. Rourman and Norman Pine, Ray's Auto Upholstery Shop, W. A. Robinson.

Carl B. Scofield, [128] Ken Sorensen, Julian A. Smith, W. H. Scovel, David Senet, Jerry Stewart, Joe E. Stewart, C. W. Sutton.

Geo. H. Thomas, D. V. Whitman, John Whitlatch, Aubrey N. Wills, Verona Winters, Michael Wagner, Albert J. Wernli, Carl R. Yeaman. [129]

EXHIBIT "B"

(Copy)

U. S. Treasury Department, Washington 25

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to ExT:ST:MH

Mr. Paul R. Rioth

President, Harbor Area Auto Glass Dealers

1331 Junipero Avenue

Long Beach 4, California

Dear Mr. Rioth:

Further reference is made to the question raised by you as to the application of the manufacturers' excise tax imposed by section 3403(c) of the Internal Revenue Code to orders received by glass dealers for automobile glass cut by them to automotive pattern.

Published ruling S. T. 928 (1943 Cumulative Internal Revenue Bulletin), pertaining to the taxability of glass cut to automobile patterns, stated in part as follows:

"It is now held that sales by the manufacturer or producer of glass cut to automobile patterns are subject to tax under section 3403(c) of the Internal Revenue Code, as amended, whether sold for stock or for installation in an automobile under immediate repair. Where, however, in connection with an immediate repair job, the glass is cut to automobile pattern pursuant to a customer's order and is installed by the person who cut such glass, the tax does not attach for the reason that the transaction

is deemed to be one involving the sale of labor and material and not the sale of an automobile part or accessory."

In various unpublished rulings issued subsequent to S. T. 928, the term "customer" as used in S. T. 928 was defined as meaning "consumer" or "individual owner" and that in ascertaining tax due this definition of the word "customer" should be applied to all transactions arising since S. T. 928 was published in June, 1943. It was on the basis of this application of S.T. 928 that the tax assessments against glass dealers were proposed.

It now appears that the great majority of glass dealers interpreted the term "customer" to mean any and all persons for whom glass was cut to automotive pattern and installed by the dealers.

After further study, it is concluded that the restricted meaning given to the word "customer" in unpublished rulings issued since the publication of S. T. 928 is unwarranted. Instead, it should be considered applicable to any patron of the glass dealer, without distinguishing between consumers and dealers or others engaged in business. It is further concluded that a proper application of the [130] manufacturers' excise tax on automobile parts does not warrant changing the word "customer", as used in S. T. 928, to more restricted language which might have the effect of taxing transactions in which the glass dealer both cuts and installs replacement glass in automobiles under immediate repair pursuant to individual orders from patrons such as repair shops, automobile dealers and insurance companies.

The taxability of transactions involving automobile glass may be measured by the rule, as stated in S. T. 928, that if the glass dealer both cuts and installs the replacement glass in an automobile under immediate repair no excise tax liability arises. On the other hand, a taxable transaction occurs if he merely cuts the glass to automobile pattern either before or after receipt of an order and uses it to fill an order which contemplates that someone other than himself or his employees will install the glass in the frame of the automobile windshield, door or window.

The pending reports recommending assessment of tax against glass dealers in the Long Beach, Wilmington and San Pedro, California area will be re-examined and acted on in accordance with the Bureau's letter.

Very truly yours,

/s/ Charles J. Valaer

Deputy Commissioner [131]

Acknowledgment of Service attached. [132]

[Endorsed]: Filed December 31, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF JUNIUS W. MARTIN

State of California,
County of Los Angeles—ss.

Junius W. Martin, being first duly sworn, deposes and says:

That he is one of the plaintiffs in the above entitled case. That there has been served upon him a notice of a proposed assessment for excise taxes for custom made to order seat covers made by him for new and used car dealers prior to August 18, 1952, in the sum of \$2,700.00.

Your affiant states that he did not collect any portion of the excise tax in question; that he does not have the funds to pay these excise taxes. That he had been led to believe that there was no excise tax chargeable on custom made to order seat covers, whether [133] made for dealers or for retail customers. That your affiant is not a manufacturer, but that all seat covers made by him were individually made on a custom made to order basis and installed on the respective cars for which the seat covers were made.

That if the defendants would enforce payment of this tax against affiant, such enforcement would destroy his business and inflict loss upon him, for which he would have no adequate remedy at law.

/s/ JUNIUS W. MARTIN

Subscribed and sworn to before me this Dec. 30, 1954.

/s/ PHILL SILVER,
Notary Public in and for said County and State

Acknowledgment of Service attached. [134]

[Endorsed]: Filed Jan. 3, 1955.

[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT FOR IN-
JUNCTION TO RESTRAIN ASSESSMENT
OR COLLECTION OF EXCISE TAXES

Come now the plaintiffs above named and for a first cause of action against the defendants, and each of them, allege as follows:

I.

That the plaintiff Martin's Auto Trimming, Inc., during all of the time hereinafter mentioned was and still is a corporation, organizing and existing under and by virtue of the laws of the State of California, with its principal place of business in the Southern District of California.

II.

That the plaintiff Martin's Auto Trimming, Inc., brings this action on its own behalf and on behalf of all others similarly situated. That said persons number approximately 185, and it is [135] therefore

impracticable to bring them all before this Court. That the same legal questions are involved as to all members of this class. That all of the persons and firms hereinafter referred to are similarly situated. That the character of the relief sought is applicable to all of the persons hereinafter referred to. That a list of the names of some of the persons for whom this action is brought is attached hereto marked Exhibit "A", and made a part hereof as though herein fully set forth.

III.

That at all times herein mentioned plaintiffs, and each of them, were each engaged in the business of operating automobile upholstery shops located in the Southern Central District of the State of California. That plaintiffs, and each of them, were engaged in the making of custom made to order seat covers by individual design and measurement for the respective automobiles of their customers. That plaintiffs made and sold custom made to order seat covers to individuals and to new and used car dealers. That none of the plaintiffs herein made any seat covers by pattern during any time referred to in this complaint, and none of the plaintiffs stocked any ready made seat covers.

IV.

That the Collector of Internal Revenue of the United States Treasury Department, acting through his agents, has heretofore notified the plaintiffs and their attorney that the plaintiffs, and each of them,

are liable for an excise tax of 8% of the gross amount of all sales of automobile seat covers, manufactured and sold by them between the year 1932 to and including August 18, 1952, to new and used car dealers.

V.

That the defendants are now threatening to assess and collect a tax from the plaintiffs and all other automobile upholstery shop owners in this district and in the State of California for any [136] automobile seat covers manufactured and sold by them to new and used car dealers prior to August 18, 1952, and to enforce against them such penalties as provided by law should they fail to pay said excise tax immediately.

VI.

That the defendants have made a proposed assessment of an excise tax against plaintiff's firm for the manufacture and sale by them of custom made seat covers for the period August 1, 1950 to August 31, 1952, in the sum of \$11,917.73. That a number of other auto upholstery shop owners for whom this action is being brought have received notice of proposed taxes to be assessed against them and others have been notified by the defendants that the defendants propose to assess a tax against them in a large sum of money for custom made to order auto seat covers manufactured and sold by them to new and used car dealers for the period 1932 to August 18, 1952.

VII.

That the plaintiff Martin's Auto Trimming, Inc., alleges that it and the other auto upholstery shops for whom this class action is brought will suffer irreparable injury and damage unless given relief against the enforcement of the tax assessments, as many of them are unable to pay the tax. That many of the trim shop owners will, in fact, be forced to close their businesses if the defendants insist upon immediate payment of the aforementioned tax.

VIII.

That none of the plaintiffs have collected any excise tax from their customers for the period mentioned hereinabove for any custom made seat covers made by them during this period of time.

IX.

That many of the plaintiffs herein, as a result of their [137] failure to have collected any excise tax from their customers are now without sufficient funds of their own to pay these taxes at this time. That many of the plaintiffs would be subjected to oppression and injustice in that they would actually be forced to close down and liquidate their business if defendants insist upon payment of the tax, inasmuch as they actually do not have the funds to pay such a tax at this time.

X.

That the equity jurisprudence of this Court is invoked to prevent a multiplicity of suits by such

of the auto upholstery shop owners who may under threat of levy and seizure of their business, borrow the money to pay the tax. That if these plaintiffs are required to pay the tax and are compelled to resort to a Court of law to recover the amount so paid, the business of this Court will be obstructed by the number of cases of the same character.

XI.

Section 3403 of the Internal Revenue Code of the United States, upon which the defendants rely for the assessment of the tax against plaintiffs, provides in part as follows: "There shall be imposed upon the following articles sold by the manufacturer, producer or importer, a tax equivalent to the following percentages of the price for which so sold; (c) parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsection (a) or (b), 2 per centum."

XII.

That Section 3403(a) refers to automobile truck chassis, automobile truck bodies and tractors and, Section (b) refers to other automobile chassis and bodies and motorcycles (including in each case parts or accessories therefor sold or in connection therewith or with the sale therewith except tractors, 3%. A sale of an automobile shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body. [138]

XIII.

Section 316.2 of the Internal Revenue Code reads:

"The taxes on the sale or use of articles covered by these regulations were originally imposed by title 4 of the Revenue Act of 1932." The applicable provisions of the Revenue Act of 1932 were superseded effective March 1, 1939 by provisions of the Internal Revenue Code.

XIV.

That Section 3403(c) was amended in 1951 to provide for a tax of 8 per centum up to and including April 1, 1954.

XV.

That the defendants have interpreted accessories to include automobile seat covers.

XVI.

That between the period of 1932, the effective date of the Revenue Act of 1952, and until the 18th day of August, 1952, the defendants herein, by and through their duly authorized officials, acting within the scope and course of their employment with the defendants, did make and issue a number of official regulations and opinions on various successive dates, both orally and in writing, to various of the plaintiffs, uniformly holding and stating that no excise tax attaches to any auto seat covers made by the plaintiffs if made by individual measurement and not by pattern, and without regard as to whether the seat covers were made and sold to either individuals or to new and used car dealers.

XVII.

That the aforesaid regulations and opinions were rendered by officials of the defendants while in the employ of the defendants and while acting within the limits of authority lawfully conferred upon them by the defendants and whose duty it was to interpret and enforce the excise tax laws concerning automobile seat covers.

XVIII.

That the plaintiffs, and each of them, in good faith at all [139] times herein mentioned relied upon these representations and opinions.

XIX.

That the aforementioned representations and opinions were made by these officials to the plaintiffs intending that the plaintiffs and each of them rely thereon. That plaintiffs did rely thereon, and in the operation by them of their respective business, did not include in any sales made by them any excise tax for any seat covers made to measure by them, whether made for individuals or for new or used car dealers for the period prior to August 18, 1952.

XX.

That plaintiffs were ignorant of defendants' intention to later assert for the first time on and after August 18, 1952, that the plaintiffs were to be subject to and liable for an excise tax retroactively on any automobile seat covers made by them for new or used car dealers, even though made

to measure and immediately installed and not placed in stock.

XXI.

On August 18, 1952, the defendants for the first time since the enactment of the Revenue Act of 1932 did issue and publish a notice stating that if a manufacturer furnishes material and makes automobile seat covers, whether according to pattern or by individually measured jobs, all sales of such seat covers would be henceforth taxable under Section 3403(c) of the Internal Revenue Code, as amended, notwithstanding any previous regulations by the defendants to the contrary.

XXII.

That the defendants are now seeking to impose upon plaintiffs, and each of them, payment of an excise tax for all automobile seat covers manufactured and sold by them on individually measured jobs and not out of stock on sales made to new or used car dealers prior to August 18, 1952. [140]

XXIII.

That by reason of the opinions and regulations issued by the defendants' officials, as aforesaid, the defendants are now estopped to assess a tax against plaintiffs for any automobile seat covers manufactured and sold by them to new or used car dealers prior to August 18, 1952, when such seat covers have been made to individual design and not by pattern and were immediately installed and not taken from stock.

XXIV.

That the amount in controversy herein exceeds the sum of \$3,000.00.

XXV.

That Robert A. Riddell is the District Director of the Internal Revenue Service for the Southern District of California.

XXVI.

That unless injunctive relief will be granted plaintiffs will suffer irreparable injury and damage and they will be subjected to oppression and injustice.

XXVII.

This action arises under the Internal Revenue Code Title 26.

For a second, separate and distinct cause of action the plaintiffs allege as follows:

I.

Plaintiffs incorporate herein paragraphs I to XV inclusive of the first cause of action, with the same force and effect as if fully set forth herein, also paragraphs XXIV to XXVII.

II.

That over a period of twenty years the defendants herein consistently issue various opinions and regulations both oral and in writing to various of the plaintiffs, interpreting Section 3403 of the Revenue Act as applicable only to manufacturers of automobile [141] seat covers and who, in fact, man-

ufactured the seat covers by patterns and placed them in stock and in like manner held that this section did not apply to automobile upholstery shops who made seat covers by individual measurement immediately tailored to the respective automobile.

III.

That the plaintiffs, and each of them, are not manufacturers but are automobile upholsterers. Plaintiffs do not cut any material for seat covers by pattern, but each automobile seat cover job is individually tailored to the measurement of the automobile upholstery in each case.

IV.

That plaintiffs did not include in their selling price any part of the manufacturer's excise tax for any period prior to August 18, 1952, in the sale of automobile seat covers by them individually tailored by measurement and immediately installed in that they relied upon the rulings and opinions issued by the defendants.

V.

The predecessor of the defendants made and published an official regulation number 46, Article 36, also known as S.T. 582, which provides as follows: "Repairs on automobiles performed in a repair shop, such as painting, auto upholstery, changes in, or replacements of woodwork and repairs to fenders and bodies are deemed to be in the nature of general repair work rather than articles sold and

are not subject to tax under Section 606 of the Revenue Act of 1932."

VI.

The ruling aforementioned was a regulation promulgated according to statute and under the authority vested in the defendants. That subsequent to the publication by the Internal Revenue Department of the aforementioned regulation, various officials in the employ of [142] the defendants did thereupon interpret said regulation to exempt from the liability of an excise tax all automobile seat covers individually tailored by measurement to the respective automobiles and immediately installed, made by auto upholstery shops.

VII.

That the defendants, on August 18, 1952, made and issued a new regulation described as Regulation 46 (1940) Section 316.55 S.T. 944 reading as follows:

"76,339 ST 944—Excise Tax—sale of automobile seat covers by the manufacturer is taxable, including those produced according to individual design and measurement for the consumer—as to sales that were previously ruled non taxable the new ruling will not apply to sales prior to August 18, 1952 (See also 38,568)."

Application of the tax, imposed by Section 3403 (c) of the Internal Revenue Code, as amended, to the sale of automobile seat covers by a manufacturer who furnishes the material therefor and produces them for the consumer thereof according to

the individual design and measurement.

Section 3403(c) of the Code, as amended, imposes effective November 1, 1951, a tax of 8 percent on the sale by the manufacturer of parts or accessories for vehicles taxable under subsection (q) and (b) of section 3403 of the Code, as amended, except that on and after April 1, 1954, the rate of tax shall be 5 per cent. Seat covers for automobiles are considered to be parts or accessories within the meaning of section 3403(c) of the Code, as amended, and sales thereof by the manufacturer are subject to tax.

The Bureau has issued rulings heretofore, that the only circumstances under which the tax does not apply to sales of seat covers by a manufacturer, is where the seat covers are individually designed, cut, tailored and fitted by the manufacturer to the automobile belonging to the person who contracts for the performance of [143] such operation, and such person is the consumer of the seat covers. Such rulings provided, however, that the sale of seat covers, similarly produced, to a dealer in new or used automobiles is not a sale for consumption but one for resale, and that the tax attaches to the manufacturer's sales thereof.

Upon reconsideration of the matter, the Bureau is now of the opinion that where a manufacturer furnished the material and produces automobile seat covers for the consumer thereof, according to individual design and measurement, the sale by the manufacturer of such seat covers is taxable under Section 3403(c) of the Code, as amended, regard-

less of whether they are installed by the manufacturer or by other persons.

The Bureau has issued rulings, as stated above, that sales by a manufacturer of seat covers, produced according to individual design and measurements, to a dealer in new or used cars, are not considered sales for consumption, and are subject to tax. The taxability of such sales is not affected by the ruling herein, and tax continues to attach, as in the past to such sales.

Because of the past rulings of the Bureau concerning the non application of the tax to automobile seat covers which are produced according to individual design and measurement for the consumer thereof, it has been concluded that, under the authority contained in section 3791(b) of the Code, the ruling set forth herein relating to seat covers so produced will not be applied retroactively with respect to sales of such seat covers prior to the date of this bulletin, except that any tax which has been paid on the sale of such seat covers will not be refunded, unless in particular case it is established to the satisfaction of the Commissioner, as required under Section 344 (d) of the Code, that the manufacturer, by reason of relying on an existing ruling that the sale of seat covers so produced was not taxable, did not include in his price any part of the manufacturers' excise tax which he *made* have subsequently paid on the [144] sale (S.T. 944 1952-17-13906).

VIII.

That in the aforementioned regulation the de-

fendants have now prescribed that automobile seat covers made according to individual design and measurement will be subject to excise tax on and after August 18, 1952, but that said regulation will not apply to sales prior to August 18, 1952, made to consumers.

IX.

The defendants have now determined that only automobile seat covers individually designed, cut, tailored and fitted by the manufacturer to the automobile belonging to the person who contracts for the performance of such operation and when such person is the consumer of the seat cover, is to be exempt from any excise tax prior to August 18, 1952, but that any auto seat covers made by plaintiffs for new or used car dealers, even though individually made to design and measurement were and are, nevertheless, subject to excise tax.

X.

That many of the plaintiffs in this action, including plaintiff Martin's Auto Trimming, Inc., are primarily engaged in making seat covers and other upholstery work for new and used car dealers rather than the general retail trade, although they do in fact, do work for both. That there are many auto upholstery shops who cater only to retail customers and do not render any work for new or used car dealers.

XI.

That the determination of August 18, 1952, S.T. 944, that auto seat covers tailored to measure by

individual design and sold to the person who contracts for the seat covers is not subject to a tax retroactively but that such sales are subject to excise tax on sales made on and after August 18, 1952, and that auto seat covers made by individual design and not by pattern for a dealer in new or used automobiles is subject to an excise tax retroactively prior to [145] August 18, 1952, was arrived at by the defendants by fundamental wrong principles and is arbitrary and confiscatory and constitutes a denial of the equal protection of the law as provided for by the Fourteenth Amendment of the Constitution of the United States, by exempting the tax on sales to retail customers when the retail customer personally contracts for the purchase of the seat covers, but applying the tax on such sales if the sale is arranged by or made through a new or used car dealer, and likewise applying the tax on used cars owned by the dealer, and not ordered for resale.

XII.

That in those instances where the plaintiffs have made seat covers for new car dealers, which is the subject matter of this proceeding, invariably the dealer has in the first instance already sold the automobile in question to a retail customer and has either as an inducement to the customer to purchase said automobile or by way of a separate sales transaction made the necessary arrangements with the plaintiffs to make and install a set of seat covers for the automobile purchased by the retail customer from them. That in this connection the new or

used car dealer is simply acting as an agent for the retail customer and, in fact, in many instances the retail customer himself appears at the place of business of the plaintiffs and selects the materials from which the seat covers are to be made. That there is, in fact, therefore, no reasonable basis upon which to distinguish a sale to a retail customer when such sale is arranged through a new and used car dealer or when the retail customer appears in person at plaintiff's place of business and makes all the necessary arrangements and the purchase himself. That practically all sales of seat covers for dealers in used cars are not for resale but are to cover up soiled or torn upholstery. That there is no reasonable basis upon which to distinguish a sale to a retail customer and a sale to a used car dealer. In these instances the used car dealer is the consumer no less than the retail customer. [146]

XIII.

That the determination exempting those automobile upholstery shops from the payment of an excise tax for automobile seat covers individually made by them for the retail consumer directly of the seat covers and in turn holding that the plaintiffs who are engaged in making automobile seat covers for new or used car dealers, as aforesaid, are subject to an excise tax is a denial of the equal protection of the law and is in violation of the Fourteenth Amendment to the Constitution of the United States.

For a third, separate and distinct cause of action, plaintiffs allege as follows:

I.

Plaintiffs incorporate herein paragraphs I to XV and XXIV to XXVII of the first cause of action, with the same force and effect as if fully set forth herein.

II.

That the plaintiffs all of the time herein mentioned were not manufacturers, producers or importers of automobile seat covers; but are automobile upholsterers, in the same category as a custom made to order tailor shop. That they do not use any patterns, such as are customarily used by automobile seat cover manufacturers. That each seat cover made by them is made to order by individual design and is tailored to the upholstery of the respective automobile. That each seat cover is individually cut, tailored and fitted by the plaintiffs to the automobile upholstery and immediately installed. That section 3403 of the Internal Revenue Code of the United States upon which the defendants rely for the assessment of a tax against the plaintiff is applicable to accessories manufactured and sold by manufacturers, producers or importers. That the plaintiffs herein and each of them, are neither manufacturers, producers or importers of automobile seat covers. That the transactions in which these [147] plaintiffs are engaged is one involving the sale of labor and material and not the

sale of an accessory within the meaning of said section.

For a fourth, separate and distinct cause of action, plaintiffs allege as follows:

I.

Plaintiffs incorporate herein paragraphs I to XV and XXIV to XXVII of the first cause of action, with the same force and effect as if fully set forth herein.

II.

That heretofore a regulation was made by the defendants, known as Regulation 46, S.T. 928, holding that glass cut to automobile pattern pursuant to a customer's order, if installed by the person who cuts such glass, that the excise tax will not attach for the reason that the transaction is deemed to be one involving the sale of labor and material and not the sale of an automobile part or accessory.

III.

That the determination that automobile seat covers made by individual pattern and designed and installed by the person who makes the same are subject to excise tax and is not one involving the sale of labor and material as was determined by Regulation 46 S.T. 928, when applied to glass for automobiles, is discriminatory and arbitrary and is a denial to the plaintiffs of the equal protection of the laws afforded by the Fourteenth Amendment of the Constitution of the United States, in that it discriminates against the plaintiffs

on the identical method of operation in favor of shop owners engaged in the business of selling and installing glass on automobiles for retail customers and new and used car dealers.

For a fifth, separate and distinct cause of action, the plaintiffs allege as follows: [148]

I.

Plaintiffs incorporate herein paragraphs I, II, III, XI, XII, XIII, XIV, XV, XXIV, XXV, XXVI and XXVII of the first cause of action, with the same force and effect as if fully set forth herein.

II.

On August 18, 1952, the defendants did issue and publish a notice stating that if a manufacturer furnishes material and makes automobile seat covers, whether according to pattern or by individual measured jobs, and whether made for the consumer or new or used car dealers, all sales of such seat covers would be henceforth taxable under Section 3403(c) of the Internal Revenue Code, as amended.

III.

That over a period of twenty years the defendants herein consistently issued various opinions and regulations, both oral and in writing, to various of the plaintiffs, interpreting section 3403 of the Revenue Act as applicable only to manufacturers of automobile seat covers and who, in fact, manufactured the seat covers by patterns and placed them in stock and in like manner held that this

section did not apply to automobile upholstery shops who made seat covers by individual measurement immediately tailored to the respective automobile.

IV.

That the plaintiffs are not manufacturers, producers or importers of automobile seat covers but are automobile upholsterers. They do not use any patterns such as are customarily used by automobile seat cover manufacturers. That each seat cover made by them is made by individual design and is tailored to the upholstery of the respective automobiles. That each seat cover is individually cut, tailored and fitted by the plaintiffs to the automobile upholstery and immediately installed.

V.

That Section 3403(c) of the Internal Revenue Code of the [149] United States, upon which the defendants rely for the payment of a tax is applicable to accessories manufactured and sold by manufacturers, producers or importers. That the plaintiffs herein, and each of them, are neither manufacturers, producers or importers of automobile seat covers. That the transactions in which these plaintiffs are engaged is one involving the sale of labor and material and not the sale of an accessory, within the meaning of said section.

VI.

Section 3448 of the Internal Revenue Code provides for penalties of 6% per annum from the time

when the tax became due until paid. Section 3612 provides for a penalty of 25% of the amount of the tax in case of any failure to make and file a return within the time prescribed by law, or in lieu thereof, additional penalties of 5% for each additional 30 days, or fraction thereof, not to exceed 25%. Section 2707 provides that any person who fails to pay, collect, and pay over the tax shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax not paid. Section 316.95 provides that any person who wilfully fails to pay any tax due, file or return is subject to a fine of \$10,000.00, or imprisonment, or both.

VII.

That in order to prevent the imposition of penalties and subject themselves to prosecution, the plaintiffs have, since August, 1952, paid over to the defendants an excise tax of 8% of the selling price for all custom made to order automobile seat covers sold by them.

VIII.

This suit is filed on behalf of the plaintiff William H. Martin, doing business as Martin's Auto Trimming, Inc., and on behalf of approximately 185 automobile upholstery shop owners similarly situated as the plaintiff. That all of said upholstery shop owners are in the same status and condition as the plaintiff Martin's Auto [150] Trimming, Inc. That all of the plaintiffs have contributed to the expense of this litigation and are directly interested therein. That the plaintiffs, and each of them, will

suffer irreparable damage unless given relief by this Court against the enforcement by the defendants of the aforementioned excise tax. That thousands of transactions are affected each day upon which the defendants claim payment of an excise tax from the plaintiffs. The plaintiffs invoked the equity jurisprudence of this Court to prevent a multiplicity of suits. That the plaintiffs do not have an adequate remedy at law.

For a sixth, separate and distinct cause of action, the plaintiffs allege as follows:

I.

Plaintiffs incorporate herein paragraphs I, II, III, XI, XII, XIII, XIV, XV, XXIV, XXV, XXVI and XXVII of the First Cause of Action with the same force and effect as if fully set forth herein. Plaintiffs also incorporate paragraphs II, III, IV, V, VI, VII and VIII of the Fifth Cause of Action with the same force and effect as if fully set forth herein.

II.

That heretofore a regulation was made by the defendants, known as Regulation 46, S.T. 928, holding that glass cut to automobile pattern pursuant to a customer's order, if installed by the person who cuts such glass, that the excise tax will not attach for the reason that the transaction is deemed to be one involving the sale of labor and material and not the sale of an automobile part or accessory.

III.

That the determination that automobile seat covers made by individual pattern and design and installed by the person who makes the same are subject to excise tax and is not one involving the sale of labor and material as was determined by Regulation 46, S.T. 928, when applied to glass for automobiles, is discriminatory and arbitrary and is a denial to the plaintiffs of the equal protection of the laws [151] afforded by the Fourteenth Amendment of the Constitution of the United States, in that it discriminates against the plaintiffs on the identical method of operation in favor of shop owners engaged in the business of selling and installing glass on automobiles for retail customers and new and used car dealers.

Wherefore, plaintiffs pray judgment for a decree of this Court that the defendants and each of them, their agents, servants, employees and attorneys, be perpetually enjoined and restrained from the collection of any excise tax levied and assessed by the defendants against the plaintiffs, or any of them, for automobile seat covers made by them either prior or subsequent to August 18, 1952, which they have designed, cut, tailored and fitted to the automobiles and immediately installed, on sales made to new or used car dealers or consumers.

That the defendants be decreed by a mandatory order of this Court to pay back the tax which has been collected by the defendants to the persons who paid the same, in the event such payment has been

made at the time of the trial of this case. In the meanwhile and during the pendency of this action, a temporary injunction be granted commanding the defendants and each and everyone of them, their agents, servants, employees and attorneys, to absolutely desist and refrain from assessing or proceeding with the assessment or from collecting or attempting to collect any and all taxes levied or assessed by the Collector of Internal Revenue Department against the plaintiffs or either of them, for custom made-to-order seat covers made and sold by them to new and used car dealers either prior or subsequent to August 18, 1952, or to the direct consumer thereof, or from collecting, or attempting to collect the tax mentioned and described in this complaint, and from enforcing or attempting to enforce the same in any way whatever, and for such further judgment in the premises as may be just and equitable, including costs of suit.

/s/ PHILL SILVER,

Attorney for Plaintiffs [152]

Duly Verified.

Membership List of California Association of Auto Trim Shops attached.

Affidavit of Service by Mail attached. [162]

[Endorsed]: Filed Jan. 21, 1955.

[Title of District Court and Cause.]

SUPPLEMENTARY AFFIDAVIT IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

United States of America,
Southern District of California—ss.

Alvin A. Underhill, being first duly sworn, deposes and says:

Reference is made to my affidavit of December 1, 1954, heretofore executed and filed herein on December 1, 1954, and hereby incorporated by reference.

Affiant further deposes and says: That at no time did affiant state to Phill Silver that he had received instructions from Washington to undertake an audit on all trim shops in this area, to determine what sales had been made to dealers and to make [163] assessments against all such trim shops and that he would have to proceed with these audits. In addition, affiant states that he received no such instructions from Washington.

Your affiant states that he never informed Phill Silver that he had no authority to sustain objections to the tax and that he intended to make an assessment regardless of the objections Phill Silver may disclose to him. On the contrary, your affiant held open to Phill Silver and his client the opportunity for informal conference which, although only for a period of ten days, was postponed better than two months to permit the plaintiff to compile facts

which were never presented to your affiant; that instead of availing themselves of their administrative remedies, counsel and plaintiff filed this action.

/s/ ALVIN A. UNDERHILL,
Affiant

Subscribed and sworn to before me this 7th day of February, 1955. Edmund L. Smith, Clerk U.S. District Court, Southern District of California.

[Seal] /s/ By MAXINE LEWIS,
Deputy [164]

Acknowledgment of Service attached. [165]

[Endorsed]: Filed Feb. 7, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF RICHARD LAMBETH

State of California,
County of Los Angeles—ss.

Richard Lambeth, being first duly sworn, deposes and says:

That he is one of the plaintiffs in the above entitled case. That there has been served upon him a notice of a proposed assessment for excise taxes for custom made to order seat covers made by him for new and used car dealers prior to August 18, 1952, in the sum of \$2,003.14.

Your affiant states that he did not collect any

portion of the excise tax in question; that he does not have the funds to pay these excise taxes. That he had been led to believe that there was no excise tax chargeable on custom made to order seat covers, [166] whether made for dealers or for retail customers. That your affiant is not a manufacturer, but that all seat covers made by him were individually made on a custom made to order basis and installed on the respective cars for which the seat covers were made.

That if the defendants would enforce payment of this tax against affiant, such enforcement would destroy his business and inflict loss upon him, for which he would have no adequate remedy at law.

/s/ RICHARD LAMBETH

Subscribed and sworn to before me this 29th day of December, 1954.

[Seal] /s/ PHILL SILVER,
Notary Public in and for said County and
State. [167]

Affidavit of Service by Mail attached. [168]

[Endorsed]: Filed Feb. 10, 1955.

[Title of District Court and Cause.]

MOTION TO STRIKE

Come now the defendants above named and through their attorneys, Laughlin E. Waters, United States Attorney, Edward R. McHale, As-

sistant United States Attorney, Chief, Tax Division, and Eugene Harpole, Special Attorney, Internal Revenue Service, move to strike the following:

1. The inclusion of "William H. Martin" and "on behalf of itself and others similarly situated" in the caption of plaintiffs' First Amended Complaint.

2. The inclusion of all references to any parties as parties plaintiff in this action other than Martin's Auto Trimming, Inc.

3. The affidavits of any parties whose affidavits have been filed herein by plaintiffs, other than those of plaintiff Martin's Auto Trimming, Inc., and of counsel for plaintiff. [169]

4. The membership list of California Association of Auto Trim Shops attached to plaintiffs' First Amended Complaint.

Defendant's motion is based on the following grounds:

1. Plaintiff alleges in paragraph 1 of Count 1 of its First Amended Complaint that Martin's Auto Trimming, Inc. is a corporation organized and existing under and by virtue of the laws of the State of California. William H. Martin has failed to show any interest in the cause alleged to exist in favor of Martin's Auto Trimming, Inc., except through his association with the corporation and is, therefore, an improper party plaintiff.

2. Plaintiff Martin's Auto Trimming, Inc. has failed to set forth specifically the identity of other parties against whom assessments are proposed to be made. Any other parties are, therefore, improperly joined as plaintiffs.

3. Many of the parties attempted to be joined with plaintiff are residing and do business in a locality outside the jurisdiction of defendant Robert A. Riddell, District Director of Internal Revenue for the Southern District of California. In no event could assessments be made by defendant against these parties.

Dated: This 21st day of February, 1955.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Assistant U.S. Attorney

Chief, Tax Division

EUGENE HARPOLE,

Special Attorney,

Internal Revenue Service

/s/ By EUGENE HARPOLE,

Attorneys for Defendants [170]

Affidavit of Service by Mail attached. [171]

[Endorsed]: Filed Feb. 21, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now T. Coleman Andrews as the duly appointed, qualified and acting Commissioner of Internal Revenue, and appearing specially and for himself alone and for no other defendant, and moves the Court that this action be dismissed as to him upon the ground and for the reason that the

Court lacks jurisdiction over the person of the Commissioner of Internal Revenue, whose official situs and legal domicile as Commissioner of Internal Revenue, is in the District of Columbia.

This motion is based upon the papers, records and files of the action. The memorandum of points and authorities filed herein on December 1, 1954, in opposition to plaintiff's motion for a preliminary injunction is here adopted by said T. Coleman Andrews as his memorandum [174] of points and authorities in support of this motion to dismiss as to him.

Dated: This 21st day of February, 1955.

LAUGHLIN E. WATERS,
United States Attorney
EDWARD R. McHALE,
Assistant U.S. Attorney
Chief, Tax Division
EUGENE HARPOLE,
Special Attorney
Internal Revenue Service,
Attorneys for Defendants [175]

Affidavit of Service by Mail attached. [178]

[Endorsed]: Filed Feb. 21, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant Robert A. Riddell, as Director of Internal Revenue for the Los Angeles, California, District, and appearing specially and for himself alone and for no other defendant, and moves the Court that the above-entitled action be dismissed

1. For lack of jurisdiction over the subject matter; and

2. For failing to state a claim upon which relief can be granted on the ground and for the reason that its maintenance is prohibited by Section 7421(a) of the Internal Revenue Code for 1954 (Section 3653(a) I.R.C., 1939).

This motion is based upon the records and files of the case, and the defendant, Robert A. Riddell, adopts the Government's memorandum of points and authorities in opposition to plaintiff's motion for preliminary injunction, which memorandum was filed on [181] December 1, 1954, as his memorandum of points and authorities in support of this motion.

Dated: This 21st day of February, 1955.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Assistant U.S. Attorney
Chief, Tax Division

EUGENE HARPOLE,

Special Attorney

Internal Revenue Service,

Attorneys for Defendants [182]

Affidavit of Service by Mail attached. [183]

[Endorsed]: Filed Feb. 21, 1955.

[Title of District Court and Cause.]

SUPPLEMENTAL MEMORANDUM OF THE
DEFENDANT IN SUPPORT OF MOTIONS
TO DISMISS AND IN OPPOSITION TO
MOTION FOR PRELIMINARY INJUNC-
TION

Preliminary Statement

Pursuant to the request of the Court, defendant, Robert A. Riddell, Director of Internal Revenue, files this memorandum with respect to the administrative procedures available to the plaintiff for conferences with respect to the proposed assessment of manufacturers' excise taxes in the office of the Audit Division of the Director of Internal Revenue at Los Angeles, and in the Appellate Division of the Internal Revenue Service at Los Angeles.

Regulations and Rulings

Title 26, Code of Federal Regulations, Section 601.4(a) to Section 601.4(d), inclusive, as amended, 17 Fed. Reg. 6949, July 30, 1952, Cumulative Pocket Supp., 26 C.F.R., 1954, pp. 226-229.

Commissioner's Mimeograph, Coll. No. 6756, January 9, 1952 (unpublished).

* * * * * [184]

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Assistant U. S. Attorney, Chief,
Tax Division

/s/ EDWARD R. McHALE,
Attorneys for Defendant, Robert A.
Riddell [187]

TREASURY DEPARTMENT
Office of Commissioner of Internal Revenue
Washington 25, D. C.

Com.-Mimeograph
Coll. No. 6756
R. A. No. 1887
A. S. No. 701

January 9, 1952

Procedure Relating to the Examination,
Processing and Closing of Excise Tax Cases

OFFICERS AND EMPLOYEES OF THE
INTERNAL REVENUE SERVICE CONCERNED:

Purpose

1. The purposes of this mimeograph are to prescribe certain new or revised procedures incident to the provisions of Com.-Mim. Coll. No. 6755, R. A. No. 1886, A. S. No. 700, effective January 20, 1952; to establish the areas within which the Collectors of Internal Revenue, Internal Revenue Agents in Charge, and Excise Tax Division will exercise jurisdiction over excise taxes; and to prescribe instructions, pursuant to the provisions of Com.-Mim. Coll. No. 6453, dated December 16, 1949, whereby Collectors will schedule for abatement, credit, or refund, certain allowances, provided the amount of the adjustment (exclusive of interest, penalties, additions to the tax, and additional amounts) for the taxable period, or other basis on which the particular excise tax being adjusted is determined under the provisions of the Code, does not exceed \$10,000.

JURISDICTION OF COLLECTORS, INTERNAL REVENUE AGENTS IN CHARGE
AND EXCISE TAX DIVISION IN RESPECT OF EXCISE TAXES

Agents' Offices

2. Investigations of taxpayers' liabilities for the following excise taxes will be under the jurisdiction of Agents' offices if the income tax return of the taxpayer is under the Agents' examination jurisdiction:

<u>Type of Tax</u>	<u>Return Form No.</u>	<u>Code Section</u>	<u>Group Code</u>		<u>Regu- lations</u>
			<u>Chapter</u>		
(a) Any liquid sold or used as a fuel in diesel-powered highway vehicles	725	2450	2	20	119
(b) Manufacturers' sale or use of:					
Matches	726	3409	2	29	44
Gasoline, etc.	726	3412	2	29	44
Lubricating oil	726	3413	2	29	44

(over)

<u>Type of Tax</u>	<u>Return Form No.</u>	<u>Code Section</u>	<u>Code Chapter</u>	<u>Regu- lations</u>
(c) Collected taxes on:				
Use of safe deposit boxes	727	1850	1 12	42
Telegraph, cable, or radio dispatches	727	3465	1 30	42
Local and long distance telephone messages, etc.	727	3465	1 30	42
Transportation of persons	727	3469	1 30	42
Transportation of property, including coal	727	3475	1 30	113
(d) Incurred tax on:				
Transportation of oil by pipe line	727	3460	2 30	42
(e) Manufacturers' sale or use of:				
Pistols and revolvers	728	2700	3 25	47
Rubber tires and inner tubes	728	3400	2 29	46
Automobile trucks, tractors, etc.	728	3403(a)	3 29	46
Other automobiles, motorcycles, etc.	728	3403(b)	3 29	46
Automobile and motorcycle parts and accessories	728	3403(c)	3 29	46
Radio and television sets, phonographs, etc.	728	3404(a)	3 29	46
Components for such sets, etc.	728	3404(b)	3 29	46
Phonograph records	728	3404(c)	3 29	46
Musical instruments	728	3404(d)	3 29	46
Household type mechanical refrigerators, quick freezers, air conditioners, etc.	728	3405	3 29	46
Sporting goods and fishing tackle	728	3406(a)(1)	3 29	46
Electric, gas and oil appliances	728	3406(a)(3)	3 29	46
Cameras, lenses, film, and photographic apparatus	728	3406(a)(4)	3 29	46
Business and store machines	728	3406(a)(6)	3 29	46
Electric light bulbs and tubes	728	3406(a)(10)	3 29	46
Firearms, shells and cartridges	728	3407	3 29	46
Mechanical pencils, fountain pens, ball point pens, mechanical lighters	728	3408	3 29	46
Electrical energy	728	3411	3 29	46
(f) Retailers' sales of:				
Jewelry	728-A	2400	4 19	51
Furs	728-A	2401	4 19	51
Toilet preparations	728-A	2402	4 19	51
Luggage	728-A	1651(a)	4 9A	51
(g) Collected taxes on:				
Admissions to theatres, concerts, etc.	729	1700(a)	1 10	43
Leases of boxes or seats	729	1700(b)	1 10	43
Club dues and initiation fees	729	1710(a)	1 10	43

EXHIBIT A

Exhibit A—(Continued)

(h) Cases involving (1) an overassessment with or without the disallowance of a claim for refund, or (2) no change in tax liability with the disallowance of a claim for refund, which are non-agreed after conference in the Agent's office will be forwarded upon written request from the taxpayer to the Appellate Staff for a hearing.

(i) Cases involving additional tax which were non-agreed in the Agent's office and sent to the Collector's office for assessment and subsequently returned to the Agent's office with a claim for abatement associated which raises no new issues or presents no important new evidence, will be forwarded to the Appellate Staff for a hearing. If new issues or important evidence are presented in the claim for abatement, due consideration will be given thereto by the Agent's office and, if necessary, the case will be transferred to the Appellate Staff for a hearing.

Technical Questions To Be Referred To Bureau

26. Technical questions as to taxability of articles and sales, or other matters, which are not free from doubt and which cannot be resolved by the Collector or the Internal Revenue Agent in Charge on the basis of the law, regulations, or a clearly applicable precedent ruling issued by the Bureau will arise while cases are in examination, review, or conference status. The Collector or the Internal Revenue Agent in Charge should communicate directly with the Excise Tax Division in Washington,

Exhibit A—(Continued)

attention ExT:DC, for advice on any question on which no clear precedent is available as to the taxability or tax classification of any transaction, or as to the fair market price or the reasonable pipeline transportation charge fixed by the Commissioner, before completing action on the case.

[Marginal note written in longhand]: This paragraph cited in par. 7 of Supp'l. No. 2.

Procedure Before the Appellate Staff

27. The cases to be considered by the Appellate Staff will be limited to overassessment cases with or without a claim for refund and cases where abatement claims have been filed with respect to which the Internal Revenue Agent in Charge and the taxpayer have been unable to reach any agreement as to the disposition to be made thereof. No case will be referred to the Appellate Staff for appellate consideration, however, unless and until the taxpayer files a written request with the Internal Revenue Agent in Charge or, where applicable, files a claim for abatement with the Collector. Except with the approval of the Head of the Appellate Staff, no case will be accepted in any Appellate Staff office from the office of any Internal Revenue Agent in Charge not within the geographical jurisdiction of the said Appellate Staff office. [190]

28. On receipt in a field office of the Appellate Staff of a case from the office of an Internal Revenue Agent in Charge, an appropriate card record will be made thereof. Until experience has demon-

Exhibit A—(Continued)

strated generally what kind of a record card will be the most satisfactory, the Appellate Staff will utilize any record cards, plain or otherwise, now available at its field offices.

29. As promptly as practicable after a case is received at a field office of the Appellate Staff, it will be assigned to a Staff conferee who will arrange with the taxpayer for a mutually satisfactory date for a conference.

30. From this point on, the procedure before the Appellate Staff will be similar to that now prescribed for the handling of income, estate and gift tax cases in the pre-ninety-day status. The taxpayer will be afforded reasonable opportunity to present his objections to the conclusions of the Internal Revenue Agent in Charge in his case and the Staff conferee will consider those objections thoroughly in the light of all the information of record.

31. In the event an agreement as to the amount of tax liability is reached, the taxpayer will be asked to execute an agreement of finality subject to acceptance by the District Head. Until experience has demonstrated the form of agreement which could be expected to prove the most satisfactory, the form of agreement to be used will be left to the discretion of the District Head. In general, however, and to the extent appropriate, it should follow the type of agreement now used by the Appellate Staff in income tax cases.

32. Whether or not an agreement as to tax liability is reached with the taxpayer, the conferee,

Exhibit A—(Continued)

on concluding his deliberations, will prepare an Action Memorandum and Supporting Statement similar, insofar as appropriate, to the memoranda now being prepared by the Appellate Staff in income tax cases. Such memoranda will set forth the issues raised, all the pertinent facts concerning them, the conferee's conclusions and his recommended "Decision." The recommended "Decision" should be reflected clearly and precisely in the Action Memorandum in order that the case thereafter may be processed correctly and in accordance therewith.

33. The Conferee's recommendations will be subject to review by the Technical Advisor in Charge of the field office where the case is considered or by a Special Assistant to the District Head, and thereafter to approval by the District Head. In the event an agreement as to tax liability is reached with the taxpayer, the District Head, on approval of the Conferee's recommendations, will note his "Acceptance" on the agreement form hereinbefore mentioned, and the date of his acceptance. [191]

34. The final action taken at a field office of the Appellate Staff will be recorded on the record card of the case and thereupon the entire file, inclusive of the finally approved recommendation of the Appellate Staff, will be returned to the Internal Revenue Agent in Charge from whom the case was received.

35. The procedure as to post review of cases handled by any field office of the Appellate Staff

Exhibit A—(Continued)

will be the same as the post review procedure of the Appellate Staff in income, estate and gift tax cases.

Disposition of Cases Received From Appellate Staff

36. Upon receipt in the office of the Internal Revenue Agent in Charge of a case file with the Appellate Staff's approved recommendation as to the action to be taken, the case will be processed, closed and disposed of in the same manner as is provided in paragraph 25 for cases closed by the Internal Revenue Agent in Charge and not referred to the Appellate Staff.

Selection, Investigation, Review, Etc.—
Collector's Offices

37(a) The procedure prescribed herein for Agents' offices will, to the extent applicable, be followed by Collectors' offices in the management and disposition of cases under the Collectors' examination jurisdiction pending issuance of more specific instructions to Collectors' offices.

(b) Attention is called to the taxpayer's privilege of requesting a conference in the Agent's office on any case which is non-agreed after conference in the Collector's office and a hearing before the Appellate Staff in the event agreement is not reached after conference in the Agent's office.

Post Review of Examined Cases by Excise
Tax Division

38(a) All examined cases, including claims al-

Exhibit A--(Continued)

lowed on survey as provided in paragraph 17, closed by the offices of Collectors of Internal Revenue and Internal Revenue Agents in Charge will, after all necessary processing required to be made in the field offices, be forwarded to the Bureau in Washington, attention ExT:DC, for such review as will promote uniformity of audit action in all field districts, except cases involving the taxes listed below:

(1) Collected taxes on admissions to theatres, concerts, etc., imposed by section 1700(a) of the Internal Revenue Code. [192]

* * * * *

Affidavit of Service by Mail attached. [193]

[Endorsed]: Filed March 4, 1955.

[Title of District Court and Cause.]

MEMORANDUM FOR ORDER

The Complaint is in six alleged causes of action.

The last five causes of action are clearly an effort to plead a cause of action under the Declaratory Relief Act, which just as clearly cannot lie, under the provisions of Section 2201 of Title 28, United States Code, which excepts controversies with respect to Federal taxes. *Beeland vs. Davis*, (C.C.A. 5, 1937) 88 F.2d 447, cert. den. 300 U.S. 680; *Scaife vs. Driscoll*, (C.C.A. 3, 1937) 94 F.2d 664, cert. den. 305 U.S. 603.

The Motion to dismiss these causes of action must be granted.

It is difficult to tell whether or not the first cause of action is one for declaratory relief. It does seek an injunction to restrain further proceedings on the proposed [202] assessment of tax, and attacks the validity of the tax. In any event, such an action is prohibited by Section 7421 of Title 26, United States Code.

The Court recognizes that that Section is not a complete bar, but finds no exceptional circumstances alleged in plaintiffs' complaint which would bring the cause of action attempted to be set forth therein within the exceptions to the rule. Particularly is this so in view of the fact that the plaintiffs have not exhausted the administrative remedies provided by the Internal Revenue Regulations (26 CFR 6014 et seq, 1954 Supp.).

The Court does not reach either the question as to whether or not it has jurisdiction of the Commissioner of Internal Revenue, or the question as to whether or not this is a proper class action, as the action must be dismissed for the reasons hereinbefore set forth.

Defendants will prepare, serve, and submit an appropriate judgment of dismissal in accordance with the foregoing.

Dated: Los Angeles, California, this 13 day of May, 1955.

/s/ PEIRSON M. HALL,
U. S. District Judge [203]

[Endorsed]: Filed May 13, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DENIAL OF PRELIMINARY INJUNCTION

Plaintiffs' Motion for Preliminary Injunction in the above-entitled action having come on for hearing before the Court at Los Angeles, California, on February 28, 1955, before the Honorable Peirson Hall, District Judge, plaintiffs appearing by Phill Silver, their attorney, and the defendants appearing by Laughlin E. Waters, United States Attorney and Edward R. McHale, Assistant United States Attorney, Chief, Tax Division; the matter having been argued and submitted on the pleadings, memoranda of authorities, affidavits, and the Court, after having considered the memoranda, the pleadings, and the affidavits, and being duly advised and on May 13, 1955, having filed its Memorandum for Order, now makes the following: [204]

Findings of Fact

I.

Plaintiff Martin's Auto Trimming, Inc., at all times herein concerned, was and is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the Southern District of California.

II.

Plaintiff, Martin's Auto Trimming, Inc., was engaged in the business of operating an automobile

upholstery shop in the Southern District of California and was engaged in the making of seat covers for the automobiles of its customers which were sold to individuals and to new and used car dealers. The Commissioner of Internal Revenue proposed an assessment of manufacturers' excise tax against plaintiff, Martin's Auto Trimming, Inc., for the manufacture and sale by said plaintiff of custom-made seat covers for the period August 1, 1950 to August 31, 1952 in the sum of \$11,917.73. There is a dispute between the plaintiff, Martin's Auto Trimming Inc., and the Internal Revenue Service with respect to the question of whether the sales of seat covers made by the plaintiff to its customers were subject to the manufacturers' excise tax under Section 3403 of the Internal Revenue Code of 1939, as amended.

III.

This action allegedly was brought by plaintiff Martin's Auto Trimming, Inc., on behalf of itself, William H. Martin, an individual, and 184 other businesses located within the Southern Judicial District of California allegedly similarly situated.

IV.

The District Director of Internal Revenue for the Los Angeles District of California has only 12 cases where tax audits have been made to determine whether a manufacturer who makes or sells seat covers is liable for additional excise taxes imposed by the provisions of Section 3403(c) of Internal Revenue Code of 1939, as amended. [205]

V.

On August 18, 1954, notice of a proposed adjustment of manufacturers' excise tax in the amounts and for the periods alleged in paragraph II hereinabove, was given to the plaintiff Martin's Auto Trimming, Inc., in Los Angeles, California, and said plaintiff was afforded the right to present its objections to the proposed assessments at an informal conference in Los Angeles which could be requested within ten days following the receipt of the notice of the proposed assessments. By letter to the Director of Internal Revenue, dated August 20, 1954, plaintiff, Martin's Auto Trimming, Inc., requested that its right to a conference be extended for a period of 30 days, which request was granted by the Director. On September 14, 1954, plaintiff again requested, and was granted, a 30-day extension for such a conference. On October 22, 1954, plaintiff again requested, and was granted, a postponement of the conference to October 29, 1954. On October 29, 1954, plaintiff again requested, and was granted, a postponement of the conference to November 4, 1954. This action was instituted by plaintiff Martin's Auto Trimming, Inc., on October 29, 1954, filing a complaint and seeking a preliminary injunction and permanent injunction restraining the assessment and collection of these taxes against plaintiff and 184 other persons allegedly similarly situated.

VI.

On October 29, 1954, plaintiff filed a complaint for injunction verified by William H. Martin, an

alleged plaintiff and president of the plaintiff, Martin's Auto Trimming, Inc., which alleged, in paragraph VII thereof, "That the plaintiff Martin's Auto Trimming, Inc., alleges that it and the other auto upholstery shops for whom this class action is brought will suffer irreparable injury and damage unless given relief against the enforcement of the tax assessments, as many of them are unable to pay the tax without great financial hardship to the continued safe operation of their businesses."

VII.

That in an affidavit filed together with motion for preliminary injunction on October 29, 1954, the affiant, William H. Martin, president of Martin's Auto Trimming, Inc., at pages 12 and 13, stated "that in order for him [Martin] to pay this tax he would actually be forced to mortgage his home."

VIII.

Under regulations promulgated by the Secretary of the Treasury incorporated in the Title 26, Code of Federal Regulations, plaintiff, Martin's Auto Trimming, Inc., was entitled to full administrative hearing prior to assessment of the tax; that after assessment of the tax and prior to payment thereof or collection thereof, it could file a claim for abatement, which filing would defer the collection of the tax or the administrative collection by the Director of Internal Revenue until it had been disposed of; that plaintiff failed to exhaust its administrative remedies.

V.

On August 18, 1954, notice of a proposed adjustment of manufacturers' excise tax in the amounts and for the periods alleged in paragraph II hereinabove, was given to the plaintiff Martin's Auto Trimming, Inc., in Los Angeles, California, and said plaintiff was afforded the right to present its objections to the proposed assessments at an informal conference in Los Angeles which could be requested within ten days following the receipt of the notice of the proposed assessments. By letter to the Director of Internal Revenue, dated August 20, 1954, plaintiff, Martin's Auto Trimming, Inc., requested that its right to a conference be extended for a period of 30 days, which request was granted by the Director. On September 14, 1954, plaintiff again requested, and was granted, a 30-day extension for such a conference. On October 22, 1954, plaintiff again requested, and was granted, a postponement of the conference to October 29, 1954. On October 29, 1954, plaintiff again requested, and was granted, a postponement of the conference to November 4, 1954. This action was instituted by plaintiff Martin's Auto Trimming, Inc., on October 29, 1954, filing a complaint and seeking a preliminary injunction and permanent injunction restraining the assessment and collection of these taxes against plaintiff and 184 other persons allegedly similarly situated.

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VII.

That in an affidavit filed together with motion for preliminary injunction on October 29, 1954, the affiant, William H. Martin, president of Martin's Auto Trimming, Inc., at pages 12 and 13, stated "that in order for him [Martin] to pay this tax he would actually be forced to mortgage his home."

VIII.

Under regulations promulgated by the Secretary of the Treasury incorporated in the Title 26, Code of Federal Regulations, plaintiff, Martin's Auto Trimming, Inc., was entitled to full administrative hearing prior to assessment of the tax; that after assessment of the tax and prior to payment thereof or collection thereof, it could file a claim for abatement, which filing would defer the collection of the tax or the administrative collection by the Director of Internal Revenue until it had been disposed of; that plaintiff failed to exhaust its administrative remedies.

IX.

The first amended complaint in each and every cause of action thereof is for declaratory relief and attacks the validity of a Federal tax.

X.

There are no exceptional circumstances alleged shown by the pleadings and affidavits on file which would bring the cause or causes of action attempted to be set forth in the first amended complaint within the exceptions to the rule prohibiting injunctions against the assessment and collection of federal taxes.

XI.

Plaintiffs may pay one or more of the proposed assessments, file a claim for refund, and in the event of its denial by rejection or inaction, sue the Government or the Director in the United States District Court or the Government in the United States Court of Claims and thus secure an adjudication of the merits of the controversy in [207] an orderly process.

And from these Facts, the Court concludes as follows:

I.

This is an action seeking to restrain the assessment and collection of Internal Revenue taxes and is prohibited by Section 7421 of the Internal Revenue Code of 1954.

II.

There are no exceptional circumstances which

would except this case from the provisions of either Title 28, Section 2201 of the United States Code, the Declaratory Relief Act, or Section 7421 of the Internal Revenue Code of 1954.

III.

Plaintiffs would not suffer irreparable injury and are not in such exceptional circumstances as to render inadequate their remedies at law; mere difficulty in raising the money to pay the taxes, or having to borrow the money is not enough.

IV.

Plaintiffs have failed to exhaust administrative remedies available to them.

V.

The relief sought is in the nature of declaratory relief with respect to Federal taxes and is barred by Title 28, United States Code, Section 2201.

VI.

Defendants are entitled to order denying motion for preliminary injunction.

VII.

Plaintiffs have an adequate remedy at law and are not entitled to equitable relief or an injunction. [208]

VIII.

Whether or not this is a proper class action is immaterial to the decision denying a preliminary in-

junction, particularly in view of the concurrent judgment dismissing this action, and the Court specifically declines to pass on the now unnecessary question raised by defendants' Motion to Strike.

Dated: August 15, 1955.

/s/ PEIRSON M. HALL,

U. S. District Judge [209]

[Endorsed]: Lodged Aug. 9, 1955. Filed Aug. 17, 1955.

In the United States District Court for the Southern District of California, Central Division

No. 17411-PH

WILLIAM H. MARTIN, Etc., Plaintiffs,

vs.

T. C. COLEMAN ANDREWS, Etc., et al.,
Defendants.

JUDGMENT AND ORDER DISMISSING ACTION

The defendant's, Robert A. Riddell's, Motion to Dismiss the above entitled action and each and every cause of action thereof on the grounds (1) that the Court lacks jurisdiction over the subject matter of the first amended complaint and each and every cause of action thereof, and (2) that said complaint and causes of action failed to state a claim upon which relief can be granted and (3) for

the further reason that its maintenance is prohibited by Section 7421(a) of the Internal Revenue Code of 1954, came on regularly for hearing before the Court at Los Angeles, California, on February 28, 1955, before the Honorable Peirson Hall, Judge; plaintiffs appeared by Phill Silver, their attorney, and the defendants appeared by Laughlin E. Waters, United States Attorney, and Edward R. McHale, Assistant [210] United States Attorney, Chief, Tax Division; the matter was argued and submitted on the pleadings and memoranda of authorities; and the Court, after having considered the memoranda and the pleadings and the files, and having on May 13, 1955, filed its Memorandum for Order, finds and concludes that the motion to dismiss the above entitled action and each and every cause of action of the First Amended Complaint for Injunction to Restrain Assessment or Collection of Excise Taxes must be granted because they fail to state a claim upon which relief can be granted and the Court lacks jurisdiction over the subject matter thereof for the reason that the last five causes of action are clearly an effort to plead a cause of action under the Declaratory Relief Act [28 U.S.C. §2201] and is prohibited by the exception therein with respect to controversies as to federal taxes; and the first cause of action is likewise prohibited by said section as well as by Section 7421 of Title 26, United States Code, the Internal Revenue Code of 1954; and that further, the plaintiffs have failed to exhaust the administrative remedies provided by the Internal Revenue regulations,

Title 26, Code of Federal Regulations, Sections 6014 et seq., 1954 Supp.; and that they have an adequate remedy at law, to pay the tax and sue for refund.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. This action and each and every cause of action thereof may be, and the same is, hereby dismissed with prejudice as to each and every defendant.

2. That the defendant, Robert A. Riddell, have judgment for his costs to be taxed by the Clerk of the Court in the sum of \$20.00.

Dated: August 16, 1955.

/s/ PEIRSON M. HALL,

U. S. District Judge [211]

Affidavit of Service by Mail attached. [212]

[Endorsed]: Lodged Aug. 9, 1955. Filed Aug. 17, 1955. Entered Aug. 18, 1955.

[Title of District Court and Cause.]

ORDER DENYING PRELIMINARY INJUNCTION

Plaintiffs' Motion for Preliminary Injunction in the above-entitled action having come on for hearing before the Court at Los Angeles, California, on February 28, 1955, before the Honorable Peirson Hall, District Judge, plaintiffs appearing by Phill Silver, their attorney, and the defendants appear-

ing by Laughlin E. Waters, United States Attorney and Edward R. McHale, Assistant United States Attorney, Chief, Tax Division; the matter having been argued and submitted on the pleadings, memoranda of authorities, affidavits, and the Court having heretofore made and filed its Memorandum for Order, its Findings of Fact and Conclusions of Law, and it appearing to the Court said motion for preliminary injunction restraining the assessment and collection of manufacturers' excise tax against Martin's Auto Trimming, [213] Inc., and others similarly situated should be denied.

It Is Hereby Ordered, Adjudged and Decreed, that the plaintiffs' Motion for Preliminary Injunction may be, and is, hereby denied.

Dated: August 15, 1955.

/s/ PEIRSON M. HALL,
U. S. District Judge [214]

[Endorsed]: Lodged Aug. 9, 1955. Filed Aug. 17, 1955. Entered Aug. 18, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the defendants above named and to Laughlin E. Waters:

Notice Is Hereby Given that the plaintiff, William H. Martin, doing business as Martin's Auto Trimming, Inc., on behalf of itself and others sim-

ilarly situated, hereby appeals to the United States Court of Appeals, Ninth Circuit, from the Judgment and Order dismissing plaintiffs' action, and from the Order denying the plaintiff a Preliminary Injunction entered in this case on August 18, 1955.

/s/ PHILL SILVER,

Attorney for Plaintiffs and

Appellants

[215]

[Endorsed]: Filed September 8, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 224, inclusive, contain the original

Complaint;

Points and Authorities;

Motion for Preliminary Injunction;

Affidavit of W. H. Martin, Rubie Gilbert and Louis Lampert;

Order to Show Cause;

Memorandum in Opposition to Plaintiff's Motion for Prelim Injunction;

Affidavit of W. H. Martin in Reply to Deft's Opposition, etc.;

Affidavits of Eugene L. Lessner and Kenneth Sorensen;

Plaintiffs' Points and Authorities in Reply to Defendants' Points, etc.;

Affidavit of Phill Silver in Reply to Defendants' Opposition;

Affidavit of Junius W. Martin;

First Amended Complaint;

Supplementary Affidavit in Opposition to Motion for Preliminary Injunction;

Affidavit of Richard Lambeth;

Motion to Strike;

Notice of Hearing on Motion to Dismiss and Motion to Dismiss;

Notice of Hearing on Motion to Dismiss and Motion to Dismiss;

Supplemental Memo of Defendant in Support of Motions to Dismiss, etc.;

Plaintiff's Reply to Defendants' Supplemental Memo of defendant;

Memorandum for Order;

Findings of Fact and Conclusions of Law;

Judgment and Order Dismissing Action;

Order Denying Preliminary Injunction;

Notice of Appeal;

Notice to the Clerk;

Defendants' Additional Designation of Record on Appeal;

Affidavit and Order for Extension of Time; constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 17th day of November, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk

/s/ By CHARLES E. JONES,
Deputy

[Endorsed]: No. 14949. United States Court of Appeals for the Ninth Circuit. William H. Martin, doing business as Martin's Auto Trimming, Inc., on behalf of itself and others similarly situated, Appellant, vs. T. C. Coleman Andrews, as the duly appointed and acting Collector of the Internal Revenue Service of the United States, and Robert A. Riddell, as Director of the Internal Revenue Service for the Southern District of California, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: November 21, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14949

WILLIAM H. MARTIN, etc., et al.,
Plaintiff and Appellant,

vs.

T. C. COLEMAN ANDREWS, etc., et al.,
Defendant and Respondent.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

(a) The United States District Court erred in determining that it lacked jurisdiction over the subject matter alleged in the First Amended Complaint;

(b) The court erred in determining that the causes of action failed to state a claim for injunctive relief;

(c) The court erred in determining that plaintiff's cause of action is prohibited by Section 7421 (a) of the Internal Revenue Code;

(d) The Court erred in determining that the appellant was required to first exhaust administrative remedies;

(e) The Court erred in determining that the appellant had an adequate remedy at law, to wit, to pay the tax and sue for the refund;

(f) The assessment of an excise tax may be restrained by injunction notwithstanding the positive

statutory prohibition of Section 3653 of the Internal Revenue Code;

(g) Section 3224 of the Revised Statutes prohibiting injunctive action to restrain assessment or collection of a tax, is not applicable where the taxing agent does not have jurisdiction to levy the tax as distinguished from errors or irregularity or other defects which are not jurisdictional;

(h) An action for an injunction will lie to restrain the collection of a tax, even though the taxpayer has not exhausted other administrative remedies;

(i) Where the enforcement of an illegal tax would lead to a multiplicity of suits, a class action to restrain the collection of a tax will lie;

(j) The Collector of Internal Revenue may be barred by a waiver or estoppel from assessing the tax;

(l) A change in governmental usage cannot be made retroactive.

Dated this 28th day of November, 1955.

/s/ PHILL SILVER,
Attorney for Plaintiff and
Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 30, 1955. Paul P. O'Brien, Clerk.

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM H. MARTIN, doing business as MARTIN'S AUTO TRIMMING, INC., on behalf of itself and others similarly situated,

Appellant,

vs.

T. C. COLEMAN ANDREWS, as the duly appointed and acting Collector of the Internal Revenue Service of the United States, and ROBERT A. RIDDELL, as Director of the Internal Revenue Service for the Southern District of California,

Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF OF APPELLANT.

PHILL SILVER,
1680 North Vine Street,
Los Angeles 28, California,
Attorney for Appellant.

FILED

MAY -9 1956

PAUL P. O'BRIEN, CLERK

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No. 14949

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM H. MARTIN, doing business as MARTIN'S AUTO TRIMMING, INC., on behalf of itself and others similarly situated,

Appellant,

vs.

T. C. COLEMAN ANDREWS, as the duly appointed and acting Collector of the Internal Revenue Service of the United States, and ROBERT A. RIDDELL, as Director of the Internal Revenue Service for the Southern District of California,

Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF OF APPELLANT.

Statement of the Case.

This is an appeal from a judgment and order dismissing plaintiff's complaint and denying plaintiff's application to restrain the assessment or collection of excise taxes.

Defendant Robert A. Riddell as Director of Internal Revenue moved to dismiss plaintiff's action on the following grounds:

1. For lack of jurisdiction over the subject matter;

2. For failure to state a claim upon which relief can be granted and for the reason that its maintenance is prohibited by Section 7421(a) of the Internal Revenue Code for 1954, Section 3653(a).

A judgment and order was made dismissing the action.

It is from this judgment and order that this appeal is taken.

Statement of Pleadings.

Plaintiff's First Amended Complaint consists of six Causes of Action. In the first cause of action plaintiff alleges that the plaintiffs were engaged in the business of operating auto upholstery shops. That the Collector of Internal Revenue had notified the plaintiffs that they were liable for an excise tax of 8% of the gross amount of all sales of automobile seat covers between the years 1932 to August 18, 1952.

That the Collector is threatening to assess and collect a tax from the plaintiffs.

That none of the plaintiffs have collected any excise tax from their customers for the period mentioned. That many of the plaintiffs as a result of their failure to have collected any excise tax from their customers are now without sufficient funds of their own to pay these taxes. That many of the plaintiffs would actually be forced to close down and liquidate their business if the Collector insists upon payment of the tax, inasmuch as they do not have the funds to pay such a tax.

The equity jurisprudence of the court is invoked to prevent a multiplicity of suits by such of the shop owners who may, under threat of levy and seizure, borrow the money to pay the tax; that if these plaintiffs are required

to pay the tax and are compelled to resort to a court of law to recover the amount so paid, the business of the court will be obstructed by the number of the same cases.

That between 1932 until August 18, 1952, the Collector, through his duly authorized officials acting within the scope and course of their employment, did make and issue a number of opinions both orally and in writing to various of the plaintiffs uniformly holding and stating that no excise tax attaches to any auto seat covers made by the plaintiffs if made by individual measurement and not by pattern.

That the plaintiffs in good faith relied upon these opinions, and did not include in any sales made by them any excise tax prior to August 18, 1952.

On August 18, 1952, the Collector for the first time since the enactment of the Revenue Act of 1932, did publish a notice stating that all sales of seat covers whether made by pattern or individual measurement would henceforth be taxable.

That the Collector is now seeking to impose upon the plaintiffs payment of an excise tax for all seat covers made and sold by them on individually measured jobs made to new or used car dealers prior to August 18, 1952.

Plaintiffs allege that by reason of the opinions issued by the defendants' officials, the collector is estopped to assess a tax against the plaintiffs for any seat covers manufactured and sold by them prior to August 18, 1952, when such seat covers were made to individual design and not by pattern and were immediately installed and not taken from stock.

That the amount in controversy exceeds the sum of \$3,000.00 and that unless injunctive relief is granted it is

alleged plaintiffs will suffer irreparable injury and damage. [Tr. p. 88.]

In plaintiff's Second Cause of Action it is alleged that plaintiffs are not manufacturers but are automobile upholsterers. That the defendants have issued a regulation that sales on seat covers for individuals prior to August 18, 1952, are exempt but that sales for new or used car dealers prior to August 18, 1952, are not exempt even though made to individual design and measurement.

That the regulation is arbitrary and confiscatory and constitutes a denial of the equal protection of the law as provided for by the Fourteenth Amendment by exempting the tax on sales to retail customers when the retailer personally contracts for the purchase of the seat covers, but applying the tax on such sales if the sale is arranged by or made through a new or used car dealer and likewise applying the tax on used cars owned by the dealer and not ordered for resale. [Tr. p. 96.]

Plaintiff's Third Cause of Action alleges that plaintiffs were not manufacturers but are automobile upholsterers in the same category as a custom made-to-order tailor shop. That the transactions involve the sale of labor and material and not the sale of an accessory. [Tr. p. 104.]

Plaintiff's Fourth Cause of Action alleges that the Collector heretofore issued a regulation—S. T. 928—holding that glass cut to automobile pattern pursuant to a customer's order if installed by the person who cuts such glass, is deemed to be a sale of labor and material and not the sale of an automobile accessory.

That the determination that automobile seat covers made by individual measurement and installed by the person who makes the same are subject to an excise tax and

is not one involving the sale of labor and material as was determined by Regulation 46 S. T. 928 when applied to glass for automobiles is discriminatory and arbitrary and is a denial to the plaintiffs of the equal protection of the laws in that it discriminates against the plaintiffs on the identical method of operation in favor of shop owners engaged in the business of selling and installing glass on automobiles for retail customers and for new and used car dealers. [Tr. p. 105.]

Plaintiff's Fifth Cause of Action alleges that defendant has issued a notice that if a manufacturer makes seat covers, whether by pattern or individual measurement, and whether made for the consumer or new or used car dealers, all such sales would henceforth be taxable.

That plaintiffs are not manufacturers but are automobile upholsterers. That the transactions in which these plaintiffs are engaged involve the sale of labor and material and not the sale of an accessory.

That in order to prevent the imposition of penalties and subject themselves to prosecution, the plaintiffs have since August 18, 1952, paid over to the Collector an excise tax of 8 per cent of the selling price for all custom made to order seat covers sold by them.

That the suit is brought on behalf of 185 upholstery shop owners similarly situated as plaintiff. That the plaintiffs will suffer irreparable damage unless given relief by the court against the enforcement of the tax. Thousands of transactions are affected each day upon which defendants claim payment of a tax. Plaintiffs invoke the equity jurisprudence of the Court to prevent a multiplicity of suits. [Tr. p. 106.]

In Plaintiffs' Sixth Cause of Action it is alleged that a regulation was made by the defendants that glass cut to pattern if immediately installed by the person who cuts such glass, is not subject to excise tax for the reason that the sale is deemed to be one involving the sale of labor and material and not the sale of an accessory.

That a determination that automobile seat covers made by individual pattern and design is subject to excise tax and is not the sale of labor and material, as was determined by S. T. 928 when applied to glass for automobiles is discriminatory and arbitrary and a denial to plaintiffs of the equal protection of the laws afforded by the Fourteenth Amendment in that it discriminates against plaintiffs on the identical method of operation in favor of shop owners engaged in the business of selling and installing glass on automobiles for retail customers and for new and used car dealers.

Plaintiffs asked that defendant be restrained from the collection of any excise tax levied or assessed by the defendant against the plaintiffs or any of them either prior or subsequent to August 18, 1952, on custom made to order seat covers sold to new and used car dealers or the direct consumer. [Tr. p. 109.]

In support of the application for a temporary restraining order plaintiffs filed the following affidavits:

Affidavit of Richard Lambeth alleging there had been served upon him a notice of a proposed tax assessment in the sum of \$2,003.04 for custom made seat covers made by him prior to August 18, 1952. His affidavit alleged that he does not have the funds to pay the tax and that if the defendants would enforce payment such enforcement would destroy his business. That he is not

a manufacturer, but that all seat covers made by him were individually made on a custom made to order basis. [Tr. p. 113.]

Affidavit of Eugene L. Lessner alleging there had been served upon him a notice of a proposed tax in the sum of \$3,685.51 for custom made to order seat covers made by him prior to August 18, 1952. That he did not collect any portion of the excise tax, that he does not have the funds to pay these taxes and that if defendant would enforce payment of this tax, such enforcement would destroy his business.

That he is not a manufacturer but that all seat covers were individually made on a custom made to order basis. [Tr. p. 73.]

Affidavit of Junius W. Martin that there was served upon him a notice of a proposed tax assessment in the sum of \$2,700.00 for custom made-to-order seat covers made by him for new and used car dealers prior to August 18, 1952. That he did not collect any portion of the excise tax; that he does not have the funds to pay; that he is not a manufacturer; that all seat covers were individually made and installed on the cars for which they were made. That if defendants would enforce payment such enforcement would destroy his business. [Tr. p. 87.]

Affidavit of William H. Martin that in 1936 he visited the office of the Internal Revenue Service in Los Angeles and was informed by an official in charge of the Excise Tax Division that an excise tax was only applicable to ready made seat covers if cut by patterns and carried in stock as a finished product; that there was no excise tax applicable to any seat covers made to individual measurement and immediately installed.

That in 1945 a Mr. Herbert G. Barnett an official in the employ of the Los Angeles Bureau of Internal Revenue made a similar statement to him.

That in September, 1952, he received a notice from the Bureau of Internal Revenue stating that commencing August 18, 1952, all sales of seat covers would be taxable regardless as to whether they were installed by the manufacturer or by other persons.

That plaintiff was not operating as a manufacturer; that each seat cover was made by individual design and not by pattern and was immediately tailored to the upholstery.

That for 20 years the defendants interpreted the regulations to require payment of a tax only on seat covers manufactured and placed on the shelves for stock and that seat covers made to order and installed immediately were not subject to tax.

That on October 14, 1947, a letter was directed to Blackwood Auto Seat Covers one of the plaintiffs on the official stationery of the Treasury Department stating that no tax applies on made to order seat covers.

That in 1948 an agent in charge of the Los Angeles office of the Internal Revenue Service made similar representations to one Rubie Gilbert, an accountant.

That in February, 1950, one Louis Lampert was informed by the head of the Excise Tax Office in the Los Angeles Internal Revenue Bureau that they had received word from Washington that no tax was to be collected on custom made to order seat covers whether the customer be a new or used car dealer or a retail customer.

That the plaintiffs relied in good faith upon the opinions and statements made and issued by the agents of the defendants and their predecessors and did not include in their selling price an excise tax for any seat covers made and installed by them prior to August 18, 1952.

That Section 379(b) of the Internal Revenue Code prohibits retroactive regulations. That the notice issued by Defendant's Exhibit "E" entitled modification by the Bureau of Internal Revenue relative to custom made seat covers dated August 18, 1952, that excise tax is to apply to sales made to new or used car dealers prior to August 18, 1952, is an attempt to repudiate the many opinions made by defendant's agents wherein these plaintiffs were led to believe there was no tax applicable on such sales.

That plaintiff William H. Martin has been handed a proposed assessment in the sum of \$11,917.73 for the period 1950 to August 18, 1952, likewise. That other plaintiffs have received notices of proposed taxes for the period prior to August 18, 1952. That plaintiffs cannot now legally enforce payment from their customers of the excise tax now sought to be enforced against them. That in order for plaintiff Martin to pay the tax he would actually be forced to mortgage his home.

That defendants have notified Richard Lambeth and M. Pelter that they are to be assessed a tax in the sum of \$2,003.14, and that if they are required to pay the tax they would be forced to liquidate their business as they do not have the money to pay the tax.

That the plaintiff Eugene L. Lessner is financially unable to pay this tax and it would cause him great financial hardship if he is forced to pay it.

That the defendants have misled the plaintiffs so that plaintiffs did not include in their selling price the excise tax on any sales which they made on custom made to order seat covers or retail customers prior to August 18, 1952.

That on February 25, 1944, one H. G. Barnett, Acting Chief of the Miscellaneous Tax Division of the Department of Internal Revenue addressed a letter to E. W. Cheadle, one of the plaintiffs, wherein Mr. Barnett stated that under the ruling of the Commissioner of Department of Internal Revenue all seat covers made from new material for immediate installation were not subject to an excise tax. That neither the plaintiff nor any of the plaintiffs ever knew that there was an excise tax to be charged, that all information they had received from defendants was that there was no excise tax to be charged.

That the imposition and enforcement of such a tax of the defendants against any of the plaintiffs would be an act of oppression and injustice and would cause plaintiffs great financial hardship and distress.

Plaintiffs asked that the defendants be estopped from assessing an excise tax against the plaintiffs or any of them for any custom made automobile seat covers made prior to August 18, 1952, for new or used car dealers. [Tr. p. 25.]

Affidavit of Kenneth Sorenson stating there had been served upon him a notice of proposed assessment for excise taxes for custom made to order seat covers in the sum of \$1,789.51 for seat covers sold to new and used car dealers prior to August 18, 1952. That he did not collect the tax; that he does not have the funds to pay these taxes; that he had been led to believe there was

no excise tax chargeable on custom made to order seat covers, whether made for dealers or retail customers. That he is not a manufacturer. That if defendant would enforce payment of this tax such enforcement would destroy his business unless he was successful in borrowing money to pay this tax. [Tr. p. 75.]

Defendants made a motion to dismiss (1) for lack of jurisdiction over the subject matter and (2) for failing to state a claim upon which relief can be granted on the ground its maintenance is prohibited by Section 7421(a) of the Internal Revenue Code.

The Court made an order granting the Motion to dismiss on the ground that plaintiff's action is prohibited by Section 7421 of Title 26 U. S. Code and that the court found no exceptional circumstances alleged in plaintiff's complaint which would bring the cause of action within the exceptions to the rule, particularly so because plaintiffs had not exhausted the administrative remedies provided by the Internal Revenue Regulations. [Tr. p. 128.]

Findings of fact were made by the court in part as follows:

That plaintiff was entitled to full administrative hearings prior to the assessment of the tax. That after assessment of the tax and prior to payment thereof, or collection thereof, plaintiff could file a claim for abatement which filing would defer the collection of the tax until it had been disposed of. That plaintiff failed to exhaust its administrative remedies. That there were no exceptional circumstances alleged by the pleadings or affidavits which would bring the causes of action within the exceptions to the rule prohibiting injunctions against the assessment and collection of federal taxes. That plain-

tiffs may pay one or more of the proposed assessments, file a claim for refund, and in the event of its denial by rejection or inaction, sue the government and thus secure an adjudication on the merits.

From the foregoing facts the court concluded:

That the action was prohibited by Section 7421 of the Internal Revenue Code;

That there are no exceptional circumstances which would except the case;

That plaintiffs would not suffer irreparable injury and are not in such exceptional circumstances so as to render inadequate their remedies at law. Mere difficulty in raising money to pay the taxes or having to borrow the money is not enough;

That plaintiffs had failed to exhaust administrative remedies available to them;

That the relief sought is in the nature of declaratory relief with respect to federal taxes and is barred by Title 28, U. S. Code, Section 2201;

That defendants are entitled to an order denying motion for preliminary injunction;

That plaintiffs have an adequate remedy at law and are not entitled to equitable relief or an injunction;

That whether this is a proper class action is immaterial to the decision denying a preliminary injunction. [Tr. p. 134.]

Judgment was made and entered dismissing the action with prejudice as to each defendant. [Tr. p. 136.]

An order was made and entered denying the preliminary injunction. [Tr. p. 138.]

Summary of Argument.

An action may be maintained to restrain the assessment or collection of excise taxes notwithstanding the positive prohibition of Section 3653 of the Internal Revenue Code.

Such an action will lie as follows:

1. When there exists special and extraordinary circumstances;
2. Where the taxing agent does not have jurisdiction to levy the tax as distinguished from errors or irregularity or other defects which are not jurisdictional;
3. Where a class action is brought or one to avoid a multiplicity of law suits.

In the instant case the defendant taxing agent never acquired jurisdiction over the plaintiff to assess against them an excise tax on custom made to order seat covers. This is sharply demonstrated by the fact that for over 20 years the men whose responsibility it was to enforce the tax not only failed to assess such a tax but throughout this period by letters and oral statements led the plaintiffs to believe that the only excise tax that was applicable was the tax on seat covers manufactured by pattern and placed on the shelves to be sold out of stock as a ready made seat cover.

The distinction now sought to be made by the tax collector that a tax would not apply retroactively to seat covers made for retail customers directly but would apply if made for new or used car dealers, was arrived at by the application of fundamentally unsound principles and violates due process of law (erroneously alleged as a violation of the Fourteenth Amendment).

The sale of custom made to order seat covers by an automobile upholsterer, is a sale of labor and materials. The excise tax in question is a manufacturer's tax and no one of the plaintiffs are manufacturers.

Appellant has adequately alleged the special and extraordinary circumstances so as to entitle plaintiffs to a trial on the merits, and to the temporary injunction prayed for.

Plaintiffs allege that the enforcement of the retroactive tax would force many of the plaintiffs to close down and liquidate their businesses as they do not have the funds to pay such a tax at this time. [Par. IX of Amended Complaint.]

Extraordinary circumstances (estoppel) are also sufficiently alleged arising from the many statements made by defendants' agents which have lulled plaintiffs into believing that there was no tax applicable, that they relied upon these statements and that they did not therefore collect any such taxes.

ARGUMENT.

The District Court determined that it lacked jurisdiction to grant the injunctive relief prayed for on the following grounds:

1. That plaintiff's last five causes of action were an effort to plead a cause of action under the Declaratory Relief Act and is prohibited by the exception therein with respect to controversies as to Federal taxes.
2. That the first cause of action is likewise prohibited by said section as well as by Section 7421 of Title 26, United States Code, the Internal Revenue Code of 1954.
3. That plaintiff failed to exhaust the Administrative remedies provided by the Internal Revenue regulations.
4. That plaintiffs have an adequate remedy at law to pay the tax and sue for refund.

I.

The District Court Erred in Determining That It Lacked Jurisdiction Over the Subject Matter Alleged in the First Amended Complaint, That the Causes of Action Failed to State a Claim for Relief and Were Prohibited by Section 7421, Internal Revenue Code.

A declaratory judgment may be entered or an injunction issued where there are extraordinary circumstances presenting unusual hardship.

There are exceptions to the broad exception in the Federal Declaratory Judgment Act. It has been said that the language which excepts federal taxes from the

Federal Declaratory Judgment Act is co-extensive with that which precludes the maintenance of a suit for the purpose of restraining the assessment or collection of a tax under Section 3653 of the Internal Revenue Code.

Tomlinson v. Smith, 128 F. 2d 808.

II.

An Assessment or Collection of a Tax May Be Restrained by Injunction Notwithstanding the Statutory Prohibition of Section 3653 of the Internal Revenue Code. (Formerly R. S. 3224.)

In the case of *Allen v. Regents*, 304 U. S. 439-448, the United States Supreme Court held that an action would lie enjoining the Collector of Internal Revenue from assessing a tax notwithstanding the provisions of Section 3224 of the Internal Revenue Code. The Supreme Court said that Section 3224 is inapplicable in exceptional cases where there is no plain, adequate and complete remedy at law.

The question presented in this case was whether the exaction of a Federal admissions tax in respect of athletic contests in which teams representing colleges unconstitutionally burdens a governmental function of the State of Georgia, to wit: The State University. The United States Collector of Internal Revenue challenged the ability of the University to maintain a suit to enjoin the application of the tax. The court below decided against the Collector and the United States Supreme Court granted certiorari. The Revenue Act of 1926 imposed a tax of 1¢ for each 10¢ admission to any place. The University contended that it was not liable for the admission tax and deposited the amount collected in a separate bank account but made no return thereof. In

consequence of the University's neglect to pay the amounts, the Commissioner assessed the University and made a demand for payment. The Collector filed a lien and levied upon the deposit account. The University sought an injunction to restrain the Collector from proceeding further to collect the sums demanded. The lower court awarded a final injunction and the Collector appealed. The Circuit Court of Appeals confirmed the decree.

The United States Supreme Court, in ruling that the court below rightfully decided the procedural questions, to wit: the right to seek an injunction, but held the court erred as to the merits. The Collector contended that R. S. 3224 prohibits the issue of an injunction against collection. (U. S. C. Title 26, Sec. 1543.) The University contended that State officials may not be required to collect an illegal tax as a condition precedent to contesting its validity, and that Section 3224 is not applicable to this suit. The United States Supreme Court said:

“The dispute as to the propriety of a suit in equity must be resolved in the light of the nature of the controversy. The respondent in good faith believes that an unconstitutional burden is laid directly upon its transactions in the sale of licenses to witness athletic exhibitions conducted under authority of the State and for an essential governmental purpose. The State is entitled to have a determination of the question whether such burden is imposed by the statute as construed and applied. It is not bound to subject its public officers and their subordinates to pains and penalties criminal and civil in order to have this question settled, if no part of the sum collected was a tax, and if the assessment was in truth the imposition of a penalty for failure to exact a tax on behalf of the United States. And if the respon-

dent is right that the statute is invalid as applied to its exhibitions, it ought not to have to incur the expense and burden of collection, return, and prosecution of claim for refund of a tax upon others which the State may not lawfully be required to collect. These extraordinary circumstances we think justify resort to equity.

What we have said indicates that R. S. 3224, *supra*, does not oust the jurisdiction. The statute is inapplicable in exceptional cases where there is no plain, adequate and complete remedy at law. This is such a case, for here the assessment is not of a tax payable by respondent but of a penalty for failure to collect it from another. The argument that no remedy need be afforded the respondent is bottomed on the assumption that it is a mere collecting agent which cannot be hurt by collecting and paying over the tax; but this argument assumes first, that respondent did in truth collect a tax and, second, that the imposition of the tax on the purchase of admissions cannot burden a state activity. This is arguing in a circle, for these are the substantial matters in controversy. We hold that the bill states a case in equity as, upon the showing made, the respondent was unable by any other proceeding adequately to raise the issue of the unconstitutionality of the Government's effort to enforce payment."

Hirst v. Gentsch, 133 F. 2d 247. In that case plaintiff alleged that the taxes which the Collector had sought from it were assessed wholly with respect to certain distributions from partnership earnings; that the partnership was not subject to such taxes; that the partnership is unable to pay such tax penalties and interest without liquidating its property and that if the Collector, whose

duty it is to collect them, proceeds to do so by distraint or levy, the plaintiff will be forced into complete cessation of its mining operations and its business will be ruined. It alleges therefore that it has no adequate remedy at law. The Circuit Court of Appeals said:

“The single question presented upon the appeal relates to the jurisdiction of the court to restrain collection of taxes assessed against the appellant under the Federal Insurance Contributions Act (Internal Revenue Code, Chapt. 9, sub-Chapt. A, Section 1400 *et seq.*, approved February 10, 1939, 53 Stat. 175, 26 U. S. C. A. Int. Rev. Code, Section 1400 *et seq.*), and the Federal Unemployment Tax Act (Internal Revenue Code, Chapt. 9, sub-Chapt. C, Section 1600 *et seq.*, 53 Stat. 183, 26 U. S. C. A. Int. Rev. Code, Section 1600 *et seq.*). The District Court dismissed the bill on the ground that it lacked jurisdiction in view of Section 3653 of Title 26 U. S. C. A. Int. Rev. Code, and also upon the ground that the complaint sets forth no facts which, if true, would entitle plaintiff to the relief prayed for.

Section 3653 of the Internal Revenue Code was formerly Section 3224 of the Revised Statutes, and provides: ‘Except as provided in sections 272(a), 871(a), and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.’

It has been construed in a long line of cases to withdraw from the courts the power to restrain assessment or collection of taxes where the challenge is to the validity or applicability of the tax. Its restraint is not, however, absolute, and beginning with *Dodge v. Brady*, 240 U. S. 122, 126, 36 S. Ct. 277, 60 L. Ed. 560, through *Hill v. Wallace*, 259 U. S. 44, 42 S. Ct. 453, 66 L. Ed. 822, and *Miller*

v. Standard Nut Margarine Co., 284 U. S. 498, 509, 52 S. Ct. 260, 76 L. Ed. 422, an exception to the universality of its application has been recognized in cases which, though apparently within its terms, present extraordinary and entirely exceptional circumstances to make its provisions inapplicable. The latest case to sustain the jurisdiction of the court to take cognizance of a suit for injunction, is *Allen, Collector v. Regents of the University*, 304 U. S. 439, 448, 58 S. Ct. 980, 82 L. Ed. 1448. It must be observed, however, that the later decisions were not reached without vigorous protest by members of the present court, including the Chief Justice.

The circumstances that are to be considered extraordinary or exceptional have never, of course, been catalogued. In *Miller v. Standard Nut Margarine Co.*, *supra*, however, the fact that the collection of a tax would prove to be arbitrary and oppressive, destroy the business of the taxpayer, ruin it financially, and inflict loss for which it would have no remedy at law, was held to indicate circumstances so extraordinary and exceptional as to give jurisdictional sanction to an application for injunction restraining the collection of the tax. Recently, under substantially identical circumstances in *Midwest Haulers, Inc. v. Brady, Acting Collector*, 6 Cir., 128 F. 2d 496, we reversed a judgment declining jurisdiction of a petition for injunction. We there pointed to the genesis of Section 3653 and traced the development of the principle underlying the exceptions to its application. This discussion need not be repeated. The present case requires the application of the same principle as governed that adjudication and must be similarly decided.

The complaint below having been dismissed upon motion, its allegations must be taken as true, and

so considered they show that the taxes sought to be collected from the appellant are probably not validly assessed taxes, and if collection is enforced by distraint the appellant will be ruined in its business and forced to close its mine. In that event no remedy provided by the Internal Revenue Law would be adequate to compensate the appellant for its loss. There is thus presented a case under the authorities, as we read them, for the interposition of a court of equity, and the exercise of its extraordinary equity power.

Judgment reversed and the cause remanded for consideration of the petition."

Miller v. Nut Margarine Co., 284 U. S. 498. Respondent, a manufacturer, brought suit to restrain the Collector from collecting from respondent any tax purporting to be levied under the Oleomargarine Act. Respondent applied for a temporary injunction. The court found that it would suffer irreparable injury unless the Collector was restrained and granted the application. At the trial the court granted a permanent injunction. The Circuit Court of Appeals held R. S. Section 3224 did not apply and affirmed the decree. The Collector seeks reversal upon the grounds that the statute forbids injunction against the collection of the tax even if erroneously assessed. That the assessment was made by the Commissioner under color of his office and was not arbitrary or capricious and that if there is any exception to the application of Section 3224 this case is not within it. The Supreme Court in affirming the decree granting the injunction said:

"Independently of, and in cases arising prior to, the enactment of the provision (Act of March 2, 1867, 14 Stat. 475) which became R. S., Section

3224, this court in harmony with the rule generally followed in courts of equity held that a suit will not lie to restrain the collection of a tax upon the sole ground of its illegality. The principal reason is that, as courts are without authority to apportion or equalize taxes or to make assessments, such suits would enable those liable for taxes in some amount to delay payment or possibly to escape their lawful burden and so to interfere with and thwart the collection of revenues for the support of the government. And this court likewise recognizes the rule that, in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector. *Dows v. Chicago*, 11 Wall. 108. *Hannerwinkle v. Georgetown*, 15 Wall. 547. *State Railroad Tax Cases*, 92 U. S. 575, 614. Section 3224 is declaratory of the principle first mentioned and is to be construed as near as may be in harmony with it and the reasons upon which it rests. *Cumberland Telephone & Telegraph Co. v. Kelly*, 160 Fed. 316, 321. *Baker v. Baker*, 13 Cal. 87, 95. *Bradley v. People*, 8 Colo. 599, 604; 9 Pac. 783; 2 Sutherland, 2d Lewis ed., Sec. 454. The section does not refer specifically to the rule applicable to cases involving exceptional circumstances. The general words employed are not sufficient, and it would require specific language undoubtedly disclosing that purpose, to warrant the inference that Congress intended to abrogate that salutary and well established rule. This court has given effect to Section 3224 in a number of cases. *Snyder v. Marks*, 109 U. S. 189, 191. *Dodge v. Osborn*, 240 U. S. 118, 121. *Dodge v. Brady*, 240 U. S. 122. It has

never held the rule to be absolute, but has repeatedly indicated that extraordinary and exceptional circumstances render its provisions inapplicable. *Hill v. Wallace*, 259 U. S. 44, 62. *Dodge v. Osborn*, *supra*, 12. *Dodge v. Brady*, *supra*. Cf. *Graham v. Du Pont*, 262 U. S. 234, 257. *Brushaber v. Union Pacific R. Co.*, 240 U. S. 1.

This is not a case in which the injunction is sought upon the mere ground of illegality because of error in the amount of the tax. The article is not covered by the Act. A valid oleomargarine tax could by no legal possibility have been assessed against respondent, and therefore the reasons underlying Section 3224 apply, if at all, with little force. *LeRoy v. East Saginaw Ry. Co.*, 18 Mich. 233, 238-239. *Kissinger v. Bean*, Fed. Cas. 7853. . . . It requires no elaboration of the facts found to show that the enforcement of the Act against respondent would be arbitrary and oppressive, would destroy its business, ruin it financially and inflict loss for which it would have no remedy at law. It is clear that, by reason of the special and extraordinary facts and circumstances, Section 3224 does not apply. The lower courts rightly held respondent entitled to the injunction."

In *Shelton v. Gill*, 202 F. 2d 503 (1953), an action was brought to enjoin the collection of an income tax. The lower court denied the injunction and dismissed the complaint. The Circuit Court of Appeals reversed the decision and held that the injunction should have been granted in that the threatened sale of the taxpayer's property would ruin him financially and the taxpayer was not afforded an adequate remedy at law.

Hill v. Wallace, 259 U. S. 44. In this case the Supreme Court said:

“It has been held by this court in *Dodge v. Brady*, 240 U. S. 122, 126, that Section 3224 of the revised statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable. In the case before us a sale of grain for future delivery without paying the tax will subject one to heavy criminal penalties. To pay the heavy tax on each of many daily transactions which occur in the ordinary business of a member of the exchange, and then sue to recover it back would necessitate a multiplicity of suits and indeed would be impracticable. For the board of trade to refuse to apply for designation as a contract market in order to test the validity of the act would stop its 1600 members in a branch of their business most important to themselves and to the country. *We think these exceptional and extraordinary circumstances with respect to the operation of their act make Section 3224 inapplicable.*”

(Supreme Court held the injunction should be granted against the Collector of Internal Revenue.)

Although a court of equity will not restrain the collection of a tax upon the sole ground of its illegality relief will be given where the remedy at law is inadequate.

Miller v. Standard Nut, 284 U. S. 498;

Hill v. Wallace, 259 U. S. 44;

Lee v. Bickell, 292 U. S. 415;

Atlantic v. Daughton, 262 U. S. 413;

Wallace v. Hines, 253 U. S. 66;

Union v. Board, 247 U. S. 282;

Stewart v. Lewis, 287 U. S. 9;

Eisley v. Mohan, 31 Cal. 2d 637, 648;
Wilson v. Illinois Southern Ry., 263 U. S. 574;
Dodge v. Brady, 240 U. S. 122, 126;
Dodge v. Osborn, 240 U. S. 118;
Higgins v. Page, 20 F. 2d 948;
Holland v. Nix, 214 F. 2d 317.

“The general rule in equity, irrespective of statute, is that where, in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity in jurisprudence, an injunction suit may be maintained. Where such circumstances exist, statutory provisions are rendered inapplicable unless specific language discloses beyond a doubt the purpose to abrogate the salutary and well established rule of equity. *Eisley v. Mohan*, 31 Cal. 2d 649.

“Where there is no adequate remedy at law, the court should have power to grant relief, otherwise the citizen will be more at the mercy of the department of the national government than is consistent with life in a free country.” (*Higgins v. Page*, 20 F. 2d 948 (1927).) See also cases collected in 108 A. L. R. 201.

In the within case the plaintiff has alleged in paragraph IX of the amended complaint as follows:

“That many of the plaintiffs would be subjected to oppression and injustice in that they would actually be forced to close down and liquidate their business if defendants insist upon payment of the tax inasmuch as they actually do not have the funds to pay such a tax at this time.”

In this case, as in the case of *Miller v. Nut Margarine Co.*, *supra*, the basis for the injunction sought is not a

mere ground of illegality because of error in the amount of the tax but that custom made seat covers are not covered by the statute. In this case, therefore, a valid excise tax, as in the case of *Miller v. Nut Margarine Co.*, *supra*, could by no legal possibility be assessed against the plaintiffs, or any of them.

The allegations (on this appeal held to be true) that many of the trim shop owners will, in fact, be forced to close their businesses if the defendants insist upon immediate payment of the tax [Par. VII of Amended Complaint]; that plaintiffs are not manufacturers and that the tax is a manufacturers tax (Third cause of action); that defendants for over 20 years led plaintiffs to believe, both by letter and by oral assurances, that there was no tax on custom made seat covers, whether for retail customers or new or used car dealers; that many of the plaintiffs would be subjected to oppression and injustice in that they would actually be forced to close down and liquidate their businesses if defendants insist upon payment of the tax, inasmuch as they do not have the funds to pay for such a tax at this time [Par. IX of Amended Complaint]; that none of the plaintiffs have collected any excise tax from their customers for the period for which the defendants are attempting to assess the tax [Par. VIII of Amended Complaint]; are the exceptional and extraordinary circumstances held sufficient in the foregoing cases cited by the plaintiff to grant this Court jurisdiction to issue injunctive relief against the assessment or enforcement of the tax.

On a motion to dismiss the facts properly pleaded must be taken as established. (*Yuba v. Kilkeary*, 206 F. 2d 884.)

III.

Section 3224 of the Revised Statutes Prohibiting Injunctive Action to Restrain Assessment or Collection of a Tax Is Not Applicable Where the Taxing Agent Does Not Have Jurisdiction to Levy the Tax, as Distinguished From Errors or Irregularity or Other Defects Which Are Not Jurisdictional.

Graham v. DuPont, 262 U. S. 234;

Ogden v. Armstrong, 168 U. S. 224;

Varnez v. Warehine, 147 F. 2d 244;

Miller v. Nut Margarine Co., 284 U. S. 510.

In *Graham v. DuPont*, *supra*, the United States Supreme Court clearly pointed out the distinction as to when an injunction to restrain the collection of a tax would lie. There the Court unequivocally said:

“The foregoing cases show that Section 3224 is applicable when the injunctive relief prayed for is dependent upon mere errors or irregularities in the assessment which do not go to the foundation of the tax. In such cases it may be properly said that provided the assessment is made on the color of their offices by proper Government officials charged with general jurisdiction of the subject of assessing taxes, the taxpayer is remitted to his legal remedy, if there be one. When, however, it is no mere error or irregularity in the assessment which is complained of, but upon the contrary, a complete want of jurisdiction in the commission to make the assessment and the assessment is in consequence void that Section 3224 is not applicable.”

In *Miller v. Nut Margarine Co.*, *supra*, the Court said:

“A valid oleomargarine tax could by no legal possibility have been assessed against respondent and therefore the reasons underlying Section 3224 apply, if at all, with little force.”

In this case the plaintiffs have alleged that the tax which the defendants seek to assess against them is a manufacturers tax and that none of the plaintiffs are manufacturers and that this tax, under no possible consideration, could be held applicable to them.

It therefore follows that in this case the Court has jurisdiction to grant injunctive relief irrespective of the prohibition of Section 3224 of the Revised Statutes.

IV.

The Court Erred in Determining That the Appellant Was Required to First Exhaust Administrative Remedies.

An Action for an Injunction Will Lie to Restrain the Collection of a Tax Even Though the Taxpayer Has Not Exhausted Administrative Remedies.

The Court determined that plaintiff had failed to exhaust the administrative remedies available to it under the Internal Revenue Service prior to the making of the assessments of taxes. Defendants had alleged that only a proposed assessment had been served on plaintiffs and that the administrative procedure provides for a conference within ten days notice of the proposed assessment. Defendants alleged the plaintiff was actually afforded almost 90 days within which to obtain such a conference and refused to avail himself of this right.

In *Shelton v. Gill*, 202 F. 2d 503, the Government, in arguing against an injunction contended that the taxpayer could sue for a refund or could appeal to the Tax Court of Appeals from the Commissioners determination of liability. In answer to these contentions the Circuit Court of Appeals said:

“It is manifest that the plaintiffs are not afforded an adequate remedy at law through the two alternative methods of judicial review available to them, that is, to permit their properties to be sold and then sue in the courts for recovery, or to appeal to the Tax Court from the Commissioners determination of liability, since the laws consequent upon the interference with their business and a forced sale of their properties would be irreparable.”

See also the case of *Eisley v. Mohan*, 31 Cal. 2d 655, where the Supreme Court of the State of California specifically held, in construing a similar statute as Section 3224 of the Revised Statutes, than an action in mandamus to restrain the assessment of a tax was proper rather than to wait for the actual assessment.

In *Higgins v. Page*, 20 F. 2d 948, on a motion to dismiss, the Circuit Court held that it has power to restrain the collection of a tax without the prepayment thereof.

In *Regents v. Page*, 81 F. 2d 577, where a state university denied it was liable for an admission tax, that it was unable to pay the tax and sue for its recovery, the court held it was entitled to maintain a bill to restrain collection of the tax without prepayment of the tax.

In *Mitsukiyo v. Alsup*, 167 F. 2d 104, a petition alleging that plaintiff had signed a form consenting to additional tax assessment upon threat of internment, that no additional tax was due, that he was in no financial position to pay the tax, was held by the court to sufficiently allege the allegations under which the application of the tax may be enjoined.

Midwest v. Brady, 128 F. 2d 496, was an action for an injunction against the tax collector. From the decree dismissing the complaint the plaintiff appealed. The action was brought to enjoin collection of additional taxes under the Social Security Act. Plaintiff alleged the illegality of the tax and that the collection of it would cause it irreparable injury and would destroy its business. That it had no funds to pay the greater portion of the tax. The Circuit Court of Appeals in holding that the Court had jurisdiction to grant the relief prayed for, said:

“When it is made to appear that the rights and property of an alleged taxpayer will be utterly destroyed if it is compelled to pay a tax that is not in fact his obligation, and the pursuit of his remedy by suit for the recovery will not adequately restore to him that which he has lost, a court of equity may take jurisdiction to grant relief *in advance of payment* notwithstanding the prohibition in Section 3653.” (Emphasis supplied.)

To the same effect *Raymond v. Chicago Traction Co.*, 207 U. S. 20, 40.

To the same effect *Wilson v. Illinois Southern Ry.*, 263 U. S. 574, which was a bill in equity to restrain

the collection of taxes on the ground the property was fraudulently over-valued out of all proportion to other taxable property in the state and invoked the jurisdiction of the District Court on the ground that the Fourteenth Amendment of the Constitution was infringed. It further alleges that if the additional amounts demanded could be recovered at all *after payment*, it would be only by multiplicity of suits against the taxing bodies where the collections are made. The defendants made a motion to dismiss for want of equity. The District Court granted the injunction as prayed and the cause was appealed direct to the Supreme Court on the single question whether the plaintiffs had an adequate remedy at law. The United States Supreme Court affirmed the decree and upheld the injunction granted by the court below.

To the same effect *Rickert Rice Mills v. Fontenot*, 297 U. S. 110, where the Supreme Court reversed and remanded the case for the entry of a decree enjoining the collection of the tax.

Allen v. Regents, 304 U. S. 439. In that case the university contended that it should not be required to collect an illegal tax as a condition precedent to contesting its validity and that Section 3224 is not applicable to the suit. In upholding its contention, the Supreme Court said:

“And if the respondent is right that the statute is invalid as applied to its exhibitions, it ought not to have to incur the expense and burden of collection, return and prosecution of claim for refund of a tax upon others which the state may not lawfully be required to collect.”

It Is a General Rule That Available Administrative Remedies Must First Be Exhausted Before a Federal Court Will Grant Injunctive Relief. But the Rule Has Been Held Not Applicable Where It Is Claimed or Clearly Shown That the Administrative Agency Is Proceeding Without Statutory Authority.

Ogden v. Armstrong, 168 U. S. 224, 241;

Vorne v. Warehime, 147 F. 2d 238, 243 (cert. den.), 325 U. S. 882;

Great Northern v. Merchants, 259 U. S. 285;

Wettre v. Hague, 168 F. 2d 825;

Farrell v. Mooman, 85 Fed. Supp. 125;

Group v. Finletter, 108 Fed. Supp. 327;

Polk v. Page, 276 Fed. 128;

Skinner & Eddy v. United States, 249 U. S. 557.

Vorne v. Warehime, 147 F. 2d 238, holding that failure to exhaust administrative remedies generally precludes resort to court but the rule has no application where defect urged goes to jurisdiction of the administrative agency.

Wettre v. Nague, 168 F. 2d 825, held that veterans were not required to exhaust administrative remedies before seeking to vindicate their rights of seniority.

Group v. Finletter, 108 Fed. Supp. 327, where injunction granted although plaintiff had not exhausted his administrative remedies, where it was alleged veterans' rights were being violated.

In *Varney v. Warehime*, 147 F. 2d 238, it is said:

"If failure to comply with an administrative order subjects one within its terms to a *penalty*, the administrative order is reviewable and does not cease to

be so merely because it is not certain whether proceedings to enforce the penalty incurred for non-compliance will be brought. When regulations affect or determine property rights generally even though not yet directed at any particular person, they may be reviewed by a court in advance of the imposition of sanctions upon a particular person when anticipated conformity to them would cause irreparable injury to the person. . . . Failure to exhaust administrative remedies generally precludes resort to the courts. However, this is not an iron clad rule and it has no application where the defect urged goes to the jurisdiction of the administrative agency. Here it is claimed that the administrative agency had no authority to proceed under the statute. Under such circumstances appellees were not required to resort to the regulations for correction of the errors and irregularities, if any, of the administration before bringing suit."

Ogden v. Armstrong, 168 U. S. 224, 240, holding that where the taxing agency did not have jurisdiction to levy the tax, the taxpayer need not proceed under the statute, and that where the tax was wholly void and illegal the statute and its remedies for errors and irregularities have no application.

Section 3448 of the Internal Revenue Code provides a penalty of 6% from the time when the tax became due until paid; Section 3612 provides for a penalty of 25% of the amount of the tax in case of any failure to make and file a return, in lieu thereof for penalties of 5% for each additional 30 days, not to exceed 25%; Section 2707 provides that any person who fails to pay and pay over the tax shall be liable for an amount equal to the tax not paid; and Section 316.95 provides that any person

who fails to pay any tax due is subject to a fine of \$10,000.00, imprisonment, or both.

The failure to file a return or to make immediate payment of a tax assessment subjects the taxpayer to interest and penalties, and under such circumstances a taxpayer is not limited to administrative remedies but may appeal to the courts.

V.

Where the Enforcement of an Illegal Tax Would Lead to a Multiplicity of Suits, a Suit to Restrain the Collection of the Tax Will Lie.

Ogden v. Armstrong, 168 U. S. 224, 237, 238, 240;

Lee v. Bickell, 292 U. S. 415;

Raymond v. Chicago Traction Co., 207 U. S. 20.

In *Lee v. Bickell*, *supra*, an action was brought to restrain the enforcement of a stamp tax. A District Court of three judges granted an interlocutory injunction which later was made permanent. The State Comptroller appealed. The Florida statute imposed a stamp tax upon all bonds issued in Florida. The failure to pay the tax is declared to be a crime and punishable accordingly. The United States Supreme Court, after reviewing the facts, said:

“Upon these facts the District Court held that the complainants, who were non-residents of Florida, were without an adequate remedy at law, and that the threatened acts of the Comptroller, if illegal, should be restrained by a court of equity. As to this we are not in doubt, *the multiplicity of actions necessary for redress at law being sufficient without reference to other considerations to uphold the remedy by injunction*. The taxes claimed by the Comptroller

and resisted by the complainants exceed the amount necessary to sustain the Federal jurisdiction. Several hundred transactions are affected every day.” (Emphasis supplied.)

(The Supreme Court affirmed the injunction granted by the lower court subject to the proviso that either party to the suit may reapply for a further decree when the Supreme Court of Florida shall have construed the statute).

In *Ogden v. Armstrong* the court said, “Where the tax was wholly void and illegal as in this case the statute and its remedies for errors and irregularities have no application.

A class suit by merchants to enjoin the collection of a tax falls within the spirit and equity of equity. (*Everglader v. Napoleon*, 253 Fed. 246, 252.)

That the complainants and the persons they represent are each severally interested in enjoying the collection of a tax and in different amounts, the theory of the class suit is applicable. (*Jackson v. State Board of Tax Commission*, 38 F. 2d 652.)

In *Gramling v. Maxwell*, 52 F. 2d 256, a suit was brought to enjoin the Commissioner from enforcing against complainant and others similarly situated a tax. Complainant alleged that he filed his suit on behalf of himself and others similarly situated. That there are a number of taxpayers in the same plight and condition as he is. That they have contributed to the expense of the litigation and are directly interested therein. That he and others will suffer irreparable damage unless given relief against the enforcement of the statute as they are unable to pay the tax. That the statute is a violation of

the Constitution and complainant invokes the equity jurisprudence to prevent a multiplicity of suits. The Commissioner filed an answer denying jurisdiction on the ground that the complainant had an adequate remedy at law to pay the tax under protest and sue for its recovery. The court held that this was a class suit not invoking the right of a single taxpayer and that the right to maintain such a suit could not be denied since the adoption of the 38th Equity Rule. (28 U. S. C. A. 723.) The court said:

“It is well settled for the purpose of avoiding a multiplicity of suits, equity will enjoin the enforcement of a nonconstitutional taxing statute. The only question is whether the prevention of such multiplicity as would result from membership of a class paying an unconstitutional tax and bringing suits for recovery thereof comes within the rule and justifies the awarding of an injunction in a suit brought in behalf of the members of the class. We think that it does.”

In Pomeroy's Equity Jurisprudence (5th Ed., Vol. 1, pp. 529-534), it is said:

“In a large number of the states the rule has been settled in well-considered and often-repeated adjudications by courts of the highest character for ability and learning, that a suit in equity will be sustained when brought by any number of taxpayers joined as co-plaintiffs, or by one or more plaintiffs suing on behalf of all taxpayers similarly situated, or sometimes even by a single taxpayer suing on his own account, to enjoin the enforcement and collection, and to set aside and annul, any and every kind of tax or assessment laid by governmental authorities, either for general or special purposes, whether it be entirely

personal in its nature and liability, or whether it be made a lien on the property of each taxpayer, whenever such tax is illegal. . . . In the face of every sort of objection urged against a judicial interference with the governmental and executive function of taxation, these courts have uniformly held that the legal remedy of the individual taxpayer against an illegal tax, either by action for damages, or perhaps by certiorari, was wholly inadequate; and that to restrict him to such imperfect remedy would, in most instances, be a substantial denial of justice, which conclusion is, in my opinion, unquestionably true. The courts have therefore sustained these equitable suits, and have granted the relief, and have uniformly placed their decision upon the inherent jurisdiction of equity to interfere for the prevention of a multiplicity of suits. The result has demonstrated the fact that complete and final relief may be given to an entire community by means of one judicial decree, which would otherwise require an indefinite amount of separate litigation by individuals even if it were attainable by any means."

It is also to be noted that Mr. Pomeroy (at p. 675) declares that:

"If recognized equitable grounds for exercising jurisdiction appear, the federal courts, in the exercise of their equity jurisdiction, are not bound by state statutes which forbid the issuance of injunctions to prevent the collection of taxes."

To the same effect, see note, 108 American Law Reports, page 218.

VI.

Section 3403 of the Internal Revenue Code Limits the Excise Tax to Articles Sold by the Manufacturer.

Defendants maintain that the sale of seat covers to a dealer in new or used automobiles is subject to the tax because such a sale is not a sale for consumption but one for resale. In S. T. 944, a ruling issued by the defendants, it was stated that the Internal Revenue Service had reconsidered its position and now concluded that the sale of seat covers by the manufacturer would be taxable on custom made to order seat covers, but the ruling went on to state that because of the past rulings concerning the non-application of the tax to automobile seat covers which are produced for the consumer, the new ruling issued on August 18, 1952, would not be applied retroactively with respect to sales of seat covers prior to August 18, 1952.

There is nothing in the statute to justify this interpretation. Section 3403 of the Internal Revenue Code reads as follows:

“There shall be imposed upon the following articles sold by the manufacturer, producer or importer a tax equivalent to the following percentages of the price for which so sold. Parts or accessories * * * (for automobiles).”

The defendants have considered seat covers to be parts or accessories within the meaning of Section 3403(c) of the Internal Revenue Code. There is no other language in Section 3403 which would enable an interpretation to be made that it was the intendment to subject seat covers

made for dealers to the excise tax while exempting sales made to consumers. As set forth in the original affidavit on file in this case, for 20 years the Collector of Internal Revenue has on innumerable occasions informed various trim shops and other persons that custom made to order seat covers, whether made for retail consumers or dealers, was not subject to excise tax.

In the case of *Johnnie & Mack, Inc. v. The United States of America*, case No. 5024-M, June 16, 1954, District Court of the United States for the Southern District of Florida, an action was commenced by the plaintiffs who were the operators of a trim shop, to recover from the Collector of Internal Revenue an assessment made against them for excise taxes on seat covers on sales made to dealers. It was the contention of the United States in that case, that sales made to dealers, even though on custom made to order seat covers, was subject to tax. The Court held that this distinction was an unwarranted distinction and granted judgment in favor of the trim shop for the recovery of the excise tax paid. This decision has become final and no appeal has been perfected therefrom by the United States.

That attached to the affidavit of William H. Martin is a copy of a letter sent to the National Association of Auto Trim Shops, signed by R. J. Bopp, whose designation is Chief, Excise Tax Branch, in which, Mr. Bopp, referring to the above cited case, said:

“We agree with the court’s conclusion of law that the distinction drawn between sales of seat covers

made to order of individual automobile owners and new or used car dealers is an unwarranted distinction.”

Section 3403(c) of the Internal Revenue Code refers to a tax on sales made by the manufacturer. Plaintiffs in this case are not manufacturers. They are no more manufacturers than are tailor shops manufacturers, and there is therefore no basis for the ruling of August 18, 1952, that custom made seat covers are subject to excise tax. Nor have the defendants in this case pointed out any logical basis why the excise tax on sales made to dealers should be applied retroactively whereas such sales previously made by them to retail customers should not be applied retroactively.

In *United States v. Meriam*, 263 U. S. 188, the Court said:

“If the words are doubtful the doubt must be resolved against the government and in favor of the taxpayer.”

In *Miller v. Nut Margarine Co.*, 284 U. S. 262, it is said:

“It is elementary that tax laws are to be interpreted liberally in favor of taxpayers and that words defining things to be taxed may not be extended beyond their clear import. Doubts must be resolved against the government and in favor of taxpayers.”

United States v. Alabama R. R. Co., 142 U. S. 615, 621:

“It is a settled doctrine of this court that in case of ambiguity the judicial department will lean in favor

of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of monies to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the government."

VII.

The Collector of Internal Revenue May Be Barred by Estoppel or Waiver From Assessing a Tax.

Smale v. Robinson, Inc., U. S. District Court,
Southern District of California, Case No. 14531.

Opinion of Judge William Mathes;

Stockstrom v. Commission, 190 F. 2d 283;

Lindsey v. Hawes, 67 U. S. 554;

United States v. Jones, 176 F. 2d 278;

Miller v. Nut Margarine Co., 284 U. S. 498;

Walker v. United States, 139 Fed. 409;

Branch v. United States, 98 Fed. Supp. 757;

Farrell v. County of Placer, 23 Cal. 2d 624, 627;

48 Harvard Law Review, 1299.

VIII.

**A Change in Governmental Usage Cannot Be Made
Retroactive.**

In *Walker v. United States*, 139 Fed. 409, cited with approval *United States v. McDaniel*, 8 L. Ed. 587, the Court said:

“Usages have been established in every department of the Government which have become a kind of common law and regulate the rights and duties of those who act within their respective limits, and no change of such usages can have a retrospective effect but must be limited to the future.”

It is respectfully submitted that the judgment dismissing the action and denying appellant a preliminary injunction should be reversed.

Respectfully submitted,

PHILL SILVER,

Attorney for Appellant.

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM H. MARTIN, doing business as Martin's Auto Trimming, Inc., on behalf of itself and others similarly situated,

Appellant,

vs.

T. C. COLEMAN ANDREWS, as the duly appointed and acting Collector of the Internal Revenue Service of the United States, and ROBERT A. RIDDELL, as Director of the Internal Revenue Service for the Southern District of California,

Appellees.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLEES.

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No. 14949.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM H. MARTIN, doing business as Martin's Auto Trimming, Inc., on behalf of itself and others similarly situated,

Appellant,

vs.

T. C. COLEMAN ANDREWS, as the duly appointed and acting Collector of the Internal Revenue Service of the United States, and ROBERT A. RIDDELL, as Director of the Internal Revenue Service for the Southern District of California,

Appellees.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLEES.

Opinion Below.

The Memorandum for Order of the District Court [R. 128-129] is not reported.

Jurisdiction.

This suit was filed in the District Court for the Southern District of California by Martin's Auto Trimming, Inc., on its own behalf and "on behalf of all other simi-

larly situated" [R. 4, 88] against T. C. Coleman Andrews (incorrectly described as Acting Collector of the Internal Revenue Service) and Robert A. Riddell (Director of the Internal Revenue Service for the Southern District of California).¹ The complaint and amended complaint prayed that the defendants and their employees be permanently enjoined from collecting the excise taxes referred to therein. [R. 21, 110.] A motion to dismiss was filed on behalf of defendant Andrews on the ground that the court lacked jurisdiction over his person since, as Commissioner of Internal Revenue, his official situs and legal domicile was in the District of Columbia. [R. 116-117.] But the District Court did not rule on that motion inasmuch as it decided that the plaintiff was not entitled to any injunctive relief. Judgment granting defendant Riddell's motion to dismiss was entered August 18, 1955. [R. 136-138.] Notice of appeal to this Court was filed on September 8, 1955, which was within sixty days. [R. 139-140.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

¹It will be seen that in the complaint [R. 1-22] and the amended complaint [R. 88-111], as well as elsewhere in the record, the term "plaintiffs" is generally used instead of "plaintiff" but these other persons who are allegedly interested in this suit were actually not parties. That should be evident since none of them entered an appearance and even the list of such persons attached to the amended complaint was admittedly not complete. [See R. 89.] Moreover, although the attorney for Martin's Auto Trimming, Inc., refers in his brief here to "the plaintiffs" the brief indicates that that corporation is the only appellant and so in fact the only party, and that is our position now as it was also in the District Court. See in this connection the defendants' motion to strike [R. 114-116] which the District Court did not pass on, apparently due to the fact that it decided to grant the motion to dismiss instead. These other persons have of course been referred to in an attempt to show that this is a class action but we do not concede that it is or could be such an action.

Questions Presented.

1. Whether, in view of the specific prohibition in Section 2201 of 28 U. S. C., the appellant is entitled to any declaratory relief from the proposed assessment of excise taxes under Section 3403(c) of the 1939 Internal Revenue Code.

2. Whether Section 7421 of the 1954 Internal Revenue Code prohibits the appellant from securing an injunction restraining the proposed assessment and collection of the excise taxes under Section 3403(c) of the 1939 Internal Revenue Code.

Statutes and Other Authorities Involved.

The pertinent provisions of the statutes and other authorities involved are set forth in the Appendix, *infra*.

Statement.

The facts as found by the District Court [R. 130-134] are as follows:

Martin's Auto Trimming, Inc. (generally referred to herein as the appellant), is a California corporation engaged in the business of operating an automobile upholstery shop in the Southern District of California. In carrying on this business appellant made seat covers which it sold to individuals and also to new and used car dealers. The Commissioner of Internal Revenue proposed an assessment of the manufacturers' excise tax against the appellant for the manufacture and sale of custom-made seat covers for the period August 1, 1950, to August 31, 1952, in the sum of \$11,917.73. Thereafter this action was allegedly brought by the appellant on behalf of itself, William H. Martin, an individual, and 184 other businesses located within the Southern Judicial District

of California and allegedly similarly situated. [R. 130-131.]

The District Director of Internal Revenue for the Los Angeles District of California has only 12 cases where tax audits have been made to determine whether a manufacturer who makes or sells seat covers is liable for additional excise taxes imposed by the provisions of Section 3403(c) of the Internal Revenue Code of 1939, as amended. [R. 131.]

On August 18, 1954, notice of a proposed adjustment of manufacturers' excise tax in the amount and for the period indicated above was given to the appellant and it was afforded the right to present its objections to the proposed assessments at an informal conference in Los Angeles which could be requested within ten days following the receipt of the notice of the proposed assessments. By letter to the Director of Internal Revenue, dated August 20, 1954, appellant requested that its right to a conference be extended for a period of 30 days, which request was granted by the Director. On September 14, 1954, appellant again requested, and was granted, a 30-day extension for such a conference. On October 22, 1954, appellant again requested, and was granted, a postponement of the conference to October 29, 1954. On October 29, 1954, appellant again requested, and was granted, a postponement of the conference to November 4, 1954. [R. 132.]

The complaint in this action, which was filed by appellant on October 29, 1954, requested both a preliminary and permanent injunction to restrain the assessment and collection of these taxes against appellant and 184 other persons allegedly similarly situated. The complaint also alleged that appellant and the other auto upholstery shops

for whom this action was brought will suffer irreparable injury and damage unless given relief against the enforcement of the tax assessments, as many of them are unable to pay the tax without great financial hardship to the continued safe operation of their businesses. Also in an affidavit filed together with the motion for preliminary injunction on October 29, 1954, the affiant, William H. Martin, president of Martin's Auto Trimming, Inc., stated "that in order for him [Martin] to pay this tax he would actually be forced to mortgage his home." [R. 132-133.]

Under Regulations promulgated by the Secretary of the Treasury, appellant was entitled to full administrative hearing prior to assessment of the tax. Also, after assessment of the tax and prior to payment thereof or collection thereof, it could file a claim for abatement, which would defer the collection of the tax until disposition of the claim. The appellant failed to exhaust its administrative remedies. [R. 133.]

On January 21, 1955, appellant filed what is called the first amended complaint. [R. 88-111.] Such complaint requests declaratory relief in each of the causes of action set out therein and also attacks the validity of the federal tax. [R. 134.]

There are no exceptional circumstances alleged or shown in the pleadings and affidavits which would bring the causes of action set forth in the first amended complaint within the exceptions to the rule prohibiting injunctions against the assessment and collection of federal taxes. [R. 134.]

Appellant and the others referred to may pay one or more of the proposed assessments, file a claim for refund, and in the event of its denial by rejection or inaction, sue the Government or the Director in the United

States District Court or the Government in the United States Court of Claims and thus secure an adjudication of the merits of the controversy in an orderly process. [R. 134.]

In view of the above findings, the District Court reached the following conclusions [R. 134-136]:

1. This is an action seeking to restrain the assessment and collection of internal revenue taxes and is prohibited by Section 7421 of the Internal Revenue Code of 1954. [R. 134.]

2. There are no exceptional circumstances which would except this case from the provisions of either 28 U. S. C., Section 2201, the Declaratory Relief Act, or Section 7421 of the Internal Revenue Code of 1954. [R. 134-135.]

3. Plaintiffs² would not suffer irreparable injury and are not in such exceptional circumstances as to render inadequate their remedies at law; mere difficulty in raising the money to pay the taxes, or having to borrow the money is not enough. [R. 135.]

4. Plaintiffs have failed to exhaust administrative remedies available to them. [R. 135.]

5. The relief sought is in the nature of declaratory relief with respect to federal taxes and is barred by 28 U. S. C., Section 2201. [R. 135.]

²Although the District Court used the term "plaintiffs" as indicated above, it did not pass on the question of whether the alleged 184 additional persons and/or companies were in fact proper parties or could be considered as such, and since the requested relief was denied, it apparently thought a ruling on their status was unnecessary.

6. Defendants are entitled to order denying motion for preliminary injunction. [R. 135.]

7. Plaintiffs have an adequate remedy at law and are not entitled to equitable relief or an injunction. [R. 135.]

8. Whether or not this is a proper class action is immaterial to the decision denying a preliminary injunction, particularly in view of the concurrent judgment dismissing this action, and the court specifically declines to pass on the now unnecessary question raised by defendants' motion to strike. [R. 135-136.]

Accordingly the District Court denied the requested injunction in a judgment entered August 18, 1955. [R. 136-138.]

Summary of Argument.

The District Court correctly held that the appellant here is not entitled to any declaratory relief from the proposed assessment of the excise tax involved here. Such relief is specifically prohibited in all tax matters by the statute relating to declaratory judgments.

The District Court also correctly held that the appellant is not entitled to an injunction against the proposed tax assessment. Another statutory provision of long standing specifically prohibits suits to restrain the assessment or collection of any federal tax, and must be applied unless there are extraordinary or exceptional circumstances. The District Court found that there were no such circumstances here and its finding is supported by the

record and is in accord with many cases in which injunctions have been denied.

In contending for the injunction, appellant asserts that the proposed assessment will cause hardship and irreparable damage and that the tax, as administered, violates its constitutional rights. But it has been repeatedly held that neither of these contentions is sufficient. Appellant's other contentions also fail to indicate any extraordinary circumstance which would warrant the issuance of an injunction. Even if it were true, as appellant argues, that it does not owe the proposed tax, such an allegation does not entitle it to equitable relief. Moreover the question of whether or not it owes the proposed tax is not one which can be decided in this suit. Actually it appears from the record here and the applicable statutory provisions that appellant is a manufacturer and is liable for the excise tax imposed on manufacturers who make and sell automobile accessories. But appellant's status and the validity of the tax can only be decided in a suit for a refund after the tax proposed has been paid. Such procedure is so well established that it is no longer open to question. Therefore appellant is in error in contending that it does not have an adequate remedy at law. It is equally in error in asserting that the proposed assessment may cause a multiplicity of suits, but even if it does, such a possibility is not a ground for allowing an injunction.

ARGUMENT.

I.

The District Court Correctly Held That Appellant Is Prohibited by Section 2201 of 28 U. S. C. From Securing Any Declaratory Relief From the Imposition of Excise Taxes.

The District Court was of the opinion that the last five causes of action in the amended complaint [R. 96-111] represent an effort on the part of appellant here to secure relief by means of a declaratory judgment and this appears to be admitted by appellant in its first contention. (Br. 15.) But, as the District Court held [R. 128], such declaratory relief cannot be granted with respect to federal tax questions. See Sec. 2201, 28 U. S. C. (Appendix, *infra*); *Noland v. Weston*, 172 F. 2d 614 (C. A. 9th), certiorari denied, 337 U. S. 938; *Royce v. Squire*, 168 F. 2d 250 (C. A. 9th); *Taylor v. Allan*, 204 F. 2d 485 (C. A. 10th); *Wilson v. Wilson*, 141 F. 2d 599 (C. A. 4th); *William B. Scaife & Sons Co. v. Driscoll*, 94 F. 2d 664 (C. A. 3d), certiorari denied, 305 U. S. 603; and *Beeland Wholesale Co. v. Davis*, 88 F. 2d 447 (C. A. 5th), certiorari denied, 300 U. S. 680. Consequently the District Court properly held that such declaratory relief is barred by Section 2201.

In attempting to get around the specific prohibition of Section 2201 and decisions like those in the above cases, appellant asserts (Br. 15) that a declaratory judgment may be entered, or an injunction issued, where there are extraordinary circumstances and cites (Br. 16) in sup-

port of its contention *Tomlinson v. Smith*, 128 F. 2d 808 (C. A. 7th). But the one seeking relief in that case was not the taxpayer. Instead, it was a trustee who had a valid lien against taxpayer's property before the Collector of Internal Revenue acquired any right to collect the taxes involved. The court thought that fact material. Therefore it held that the language of Section 2201 in specifically excepting federal taxes from the Declaratory Judgment Act applies to suits by taxpayers and not to those brought by third parties. However, in clarifying its position, the court pointed out (p. 811) that:

It does not follow, from what we have said, that the court has jurisdiction to enter a declaratory judgment as to the validity of the tax which defendant has sought to impose upon the partnership. We think that such a declaration is precluded by the exception contained in the Declaratory Judgment Act.

In view of the facts there and the court's explanation of its position, it is evident that the *Tomlinson* case does not help the appellant here. Moreover it is doubtful whether the courts rendering the decisions in the above cases would go as far as the Seventh Circuit did. Certainly those cases state unequivocally that there is no authority for rendering a declaratory judgment in respect to federal tax questions.

II.

The District Court Correctly Held That the Appellant Is Not Entitled to an Injunction Against the Proposed Assessment of Excise Taxes Under Section 3403 of the 1939 Internal Revenue Code.

Section 7421(a) of the 1954 Internal Revenue Code (Appendix, *infra*), which is a reenactment of 1939 Code Section 3653(a) and also of Section 3224 of the Revised Statutes, provides, with exceptions not material here, that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.” The District Court held that that section prohibited the granting of appellant’s request for injunction here because there are no extraordinary or exceptional circumstances which bring this case within any of the recognized exceptions to the statute. In reaching that conclusion, the District Court also decided that the appellant has an adequate remedy at law and is not entitled to equitable relief. We submit that the District Court’s decision is amply supported by the facts and is in accord with many decisions.

Notwithstanding the well-established rule set forth in such cases, appellant contends that it is entitled to an injunction restraining the proposed assessment under 1939 Code Section 3403(c) (Appendix, *infra*). Among the reasons advanced by appellant in the brief here or in its complaints [R. 1-22, 88-111] are (1) that imposition of this tax would cause great hardship and even irreparable injury not only to appellant but to others similarly situated; (2) that there is no adequate remedy at law; (3)

that appellant is not a manufacturer and so is not liable for the tax imposed by Section 3403(c); (4) that such tax, as administered, is unconstitutional; and (5) that the Collector of Internal Revenue may be barred by estoppel because of alleged changes in rulings on such tax. We cannot accept appellant's reasons for, as we shall now point out, the same or similar reasons have been repeatedly considered by the courts and have been found insufficient for granting an injunction to restrain the assessment of federal taxes.

The reason which appellant seems to have emphasized most in its complaints and affidavits was the great hardship which the proposed assessment may cause. However, neither the appellant nor any of those allegedly interested in this suit have produced any financial statements to support this allegation of hardship. But even if it is true, it would not be a sufficient reason for an injunction. See *Matcovich v. Nickell*, 134 F. 2d 837 (C. A. 9th), in which it was held that neither irreparable injury nor illegal exaction of a tax is sufficient basis for enjoining the assessment of such tax. In reaching that conclusion this Court cited with approval *Kaus v. Huston*, 120 F. 2d 183 (C. A. 8th), in which it was said (p. 185):

The assessments are for taxes, and not for exactions in the guise of taxes. The appellant may not owe them, but that does not change their nature, nor is nonliability a special or extraordinary circumstance. This case presents the ordinary situation of a taxpayer resisting payment of taxes which he believes that he does not owe. That the appellant is in poor financial condition, that it will be a hardship upon him to pay the taxes and sue for their recovery, that to compel him to pay them threatens ultimate ruin to his business, and that a court of Iowa has ruled that appellant was not an employer of the drivers of his cars

and was not liable for contributions under the Iowa Unemployment Compensation Law, Chap. 77.2, Code of Iowa, 1939, §1551.07 *et seq.*, we do not regard as "special and extraordinary circumstances" which would justify the maintenance of this action to enjoin the collection of these taxes.

For cases in accord see *Jewel Shop of Abbeville, South Carolina v. Pitts*, 218 F. 2d 692 (C. A. 4th); *Milliken v. Gill*, 211 F. 2d 869 (C. A. 4th), certiorari denied, 348 U. S. 827; *Dyer v. Gallagher*, 203 F. 2d 477 (C. A. 6th); *Sturgeon v. Schuster*, 158 F. 2d 811 (C. A. 10th), certiorari denied, 331 U. S. 817; *Burke v. Mingori*, 128 F. 2d 996 (C. A. 10th), certiorari denied, 317 U. S. 662; and *Reams v. Vrooman-Fehn Printing Co.*, 140 F. 2d 237 (C. A. 6th).

In the *Reams* case, just cited, the Sixth Circuit considered whether the unconstitutionality of a tax could be a proper basis for an injunction and, in holding that it was not, explained the philosophy behind the statutory provision here as follows (pp. 240-242):

The principle that a taxpayer may not bring a suit in equity for the purpose of restraining the assessment or collection of a tax has long existed. Public necessity gives the rule vitality. The Internal Revenue Code, 26 U. S. C. A. §3653, codified the limitation upon the equity powers of federal courts to restrain the collection of taxes and fortified the policy of allowing the government to be unhampered in the collection of its revenue. *No independent equity jurisdiction appearing, the statute applies, even where the collection or assessment of the tax is unwarranted.* *Graham v. Dupont*, 262 U. S. 234, 43 S. Ct. 567, 67 L. Ed. 965; *Keogh v. Neely*, 284 U. S. 583, 52 S. Ct. 39, 76 L. Ed. 504. Unless there is a clear showing that a taxpayer will suffer a wrong without any other remedy, *neither the validity*

or accuracy, nor the constitutionality of a tax may be tested in an action brought to restrain its collection only and it is immaterial that the collection of the tax is wholly void or that the object sought to be taxed is beyond the purview of the taxing statute. The concept of the statutory prohibition against the injunction is what the revenue statutes prescribe a complete method for the ultimate determination of the correct tax and that since the taxpayer has a proper remedy thereunder, the courts will not interfere with the summary collection of the taxes.

* * * * *

Hardship in raising money with which to pay taxes is now common to all taxpayers, but this is not a special circumstance conferring equity jurisdiction on the courts to prevent collection by injunctive process. (*Italics supplied.*)

Also see *Bailey v. George*, 259 U. S. 16, holding that an averment that the taxing statute is unconstitutional is not grounds for an injunction and *Voss v. Hinds*, 208 F. 2d 912 (C. A. 10th), holding that neither the validity nor the constitutionality of the tax involved constitutes a sufficient basis for an injunction to restrain the collection thereof.

It is evident that the above cases not only dispose of appellant's point relative to its constitutional rights but also answer its allegation that the proposed tax is invalid because it is not a manufacturer. Obviously, in making that contention the appellant is attempting to bring its case within the ruling of *Miller v. Nut Margarine Co.*, 284 U. S. 498, on which it relies so heavily (Br. 21-24), but that case is clearly distinguishable. There the company seeking the injunction was the manufacturer of a product which was not oleomargarine. Thus it could

not be legally taxed under the act imposing a tax on oleomargarine. Accordingly, since the Supreme Court found that there was "no legal possibility" (p. 510) of a valid oleomargarine tax being imposed on the manufacturer involved there, it granted an injunction to restrain collection of such tax.

But the situation is different here for it is evident that there is a legal possibility of the imposition of a valid tax in this case, and appellant is not in a position to deny such possibility. As to this, the record shows that the appellant is and has been engaged in the business of making and selling seat covers to new and used car dealers and to individual owners. [R. 4, 89, 130-131.] Moreover, the revenue law has long imposed an excise tax on the manufacturer who sells automobile accessories (see 1939 Code Sec. 3403(c)) and the Regulations relating to that section are broad enough not only to include the appellant here as a manufacturer but also to include a seat cover as an automobile accessory (see Secs. 316.4 and 316.55 of Treasury Regulations 46 (Appendix, *infra*)). Thus, under the ruling in *Miller v. Nut Margarine Co.*, *supra*, it becomes clear that there is definitely a legal possibility that a valid tax can be imposed on the appellant under Section 3403(c) and that this is not a proper case for enjoining the assessment of such tax.

However, while it is our opinion that the appellant and others similarly situated are in fact manufacturers and should pay the tax required by Section 3403(c), we do not think that we can properly consider any question here as to the scope or validity of the proposed tax. In other words, the applicable decisions indicate that in a suit to enjoin collection of a tax, consideration must be limited to those factors which indicate the presence or absence

of exceptional and extraordinary circumstances. As to this see *Jewel Shop of Abbeville, South Carolina v. Pitts*, 218 F. 2d 692, 694 (C. A. 4th), in which it was held that although the District Court had correctly denied the injunction it had gone beyond its powers in attempting to determine anything more than whether there were extraordinary circumstances justifying the relief. Since the District Court had appointed a receiver, who as a special master had taken evidence on the amount of excise and income taxes due, the Fourth Circuit remanded the case to revoke the appointment of the receiver and to dismiss the complaint without prejudice of the taxpayer to litigate its tax obligations in a proper forum.

Obviously the appellant here is also entitled to have such questions considered by the proper forum and should be allowed to make a defense to the proposed imposition of such tax in that forum but that will be in a suit for refund and not in a case for equitable relief. Being of that opinion, we also consider it unnecessary to discuss the possible effect of alleged changes in the Treasury rulings with reference to a manufacturer's liability under Section 3403(c). However, as appellant refers (Br. 38) to the administrative ruling S. T. 944, 1952-2 Cum. Bull. 255, and implies that it is not a fair interpretation of the statute, we set forth such ruling in our Appendix, *infra*, to show that the official interpretation as to a tax on manufacturers who sell to new and used car dealers (to whom the major portion of appellant's sales were made) was not changed by that ruling.³ The scope of

³Although appellant purportedly set out the above ruling in its complaints [R. 13, 98], actually the paragraph quoted therein is merely an abbreviated statement relative to the ruling which appeared in paragraph 76,339 of the 1952 Prentice-Hall Federal Tax Service and such statement, because of its brevity, is obviously misleading.

this ruling was fully explained by R. J. Bopp, Chief of the Excise Tax Branch, in a letter appearing in the record at pages 67-70. For further information concerning history and scope of various rulings pertaining to Section 3403(c) see the brief filed on behalf of the appellee in *Hirasuna v. McKenney*, which is now pending in this Court (No. 14995).

Another contention of the appellant is that it should be allowed an injunction against the proposed assessment because it has no adequate remedy at law, but the District Court found otherwise and properly so. The appellant does not deny that it will be allowed to sue for a refund if the proposed excise tax is assessed and collected and actually gives no acceptable reason why it should not do so. Appellant does argue (Br. 28-32) that it was not required to avail itself of the various administrative remedies which were specifically brought to its attention. [R. 55, 112-113, 121-128.] However, even if that is a correct statement, appellant did indicate from time to time that it would confer with internal revenue officials about the proposed assessment [R. 57-58] and it seems strange that it did not do so since it is contending here that the proposed assessment is discriminatory and unfair. But, regardless of whether it should have availed itself of administrative remedies, it is evident that it does have an adequate remedy at law.

As the Supreme Court stated years ago in *State Railroad Tax Cases*, 92 U. S. 575, 613:

It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irregularity, of themselves, give the right to an injunction in a court of equity. * * *

The government of the United States has provided, both in the customs and in the internal reve-

nue, a complete system of corrective justice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. But there is no place in this system for an application to a court of justice until after the money is paid.

The Supreme Court again pointed out in *Snyder v. Marks*, 109 U. S. 189, that the inhibition of the statutory provision here applies to all assessments of taxes made under color of their office by internal revenue officers charged with assessing taxes, and stated that (p. 193):

The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. *The remedy so given is exclusive, and no other remedy can be substituted for it.* (Italics supplied.)

In other words, although Congress has denied courts the judicial power to restrain the collection of taxes, it has given a taxpayer an adequate remedy by allowing it to recover any unjust exactions in a suit at law. Consequently the question of whether a tax is rightfully due from a person may be determined only in a suit for refund. *Jacoby v. Hoey*, 86 F. 2d 108 (C. A. 2d), certiorari denied, 299 U. S. 613. And that is true even though the person involved contends, as in this case, that he is not a manufacturer and does not owe the tax which may be assessed. See *Burke v. Mingori*, *supra*; *Rothensies v. Lichtenstein*, 91 F. 2d 544 (C. A. 3d); and *Larson v. House*, 112 F. 2d 930 (C. A. 5th).

Furthermore, since we have already shown that hardship and the alleged irreparable damage to appellant's business are not sufficient bases for the requested injunction, it is also obvious that such hardship and alleged damage cannot be advanced here as reasons for contending that there is no adequate remedy at law. Neither can appellant advance as a reason that the denial of the injunction might result in a multiplicity of suits. We cannot agree either that there will be a multiplicity of suits or, if there should be, that such a reason is a proper basis for an injunction. The fact that numerous individuals have a like interest with the one seeking an injunction will not give the court jurisdiction to enjoin assessment and collection of a tax. See *Robique v. Lambert*, 114 F. Supp. 305 (E. D. La.), affirmed *per curiam*, 214 F. 2d 3 (C. A. 5th), and *City of Seattle v. Poe*, 4 F. 2d 276 (W. D. Wash.).

Certainly it is evident that any question which appellant may be entitled to raise concerning the validity and scope of the proposed assessment can be decided in one suit for refund after the proposed tax is paid. Moreover, as to the others who are allegedly interested and who presumably might file actions at law, it is also evident that such actions may be unnecessary if they are in fact similarly situated. This is so because questions to be raised by such persons can undoubtedly be settled administratively after the law is decided in appropriate test suits.

In this connection it should be noted that statements in the affidavit of counsel for appellant [R. 79] were categorically denied by Alvin A. Underhill, Group Supervisor of the Excise Tax Group of the Audit Division in the Internal Revenue Service office in Los Angeles, who stated that he had never advised counsel for the appellant that he had been instructed to make assessments against

all of the automobile "trim shops" in his area, or that he intended to make assessments regardless of any objections by counsel. Underhill also stated that for more than two months he gave counsel and his client the opportunity to be heard and extended the time in order to permit them to compile facts on their situation, but no facts were ever presented and, instead of availing themselves of the administrative remedies which he offered, counsel filed this injunction suit. [R. 112-113.]

In support of its position here, appellant has cited many cases. An analysis of these will show that in the cases which are applicable (*i.e.*, cases in which taxpayers were seeking to enjoin the assessment or collection of a federal tax) the principle announced is the same as that set forth in the cases on which we rely. Thus, while some courts may have seemed to view a taxpayer's request more liberally than others, they have all indicated that the test for granting or denying an injunction is the presence or absence of extraordinary and exceptional circumstances. Among those cases in which injunctions were granted are *Miller v. Nut Margarine Co.*, 284 U. S. 498 (already discussed above); *Shelton v. Gill*, 202 F. 2d 503 (C. A. 4th) (in which an individual and a corporation were assessed as transferees but were in fact not transferees); *Mitsukiyo Yoshimura v. Alsup*, 167 F. 2d 104 (C. A. 9th) (in which taxpayer was illegally coerced into signing a waiver for assessment and collection of the proposed tax); and *John M. Hirst & Co. v. Gentsch*, 133 F. 2d 247 (C. A. 6th) (in which taxes under the Federal Unemployment Tax Act were assessed against mining partners not on salaries but on their distributive shares of partnership earnings and were protested both as invalid and as totally ruinous to their mining business). It will be seen that in all of the cases just referred to the decisions were

based on circumstances which were entirely different from those here and were in fact extraordinary and exceptional ones.

Appellant has also cited several cases involving state or municipal taxes. Among these are *Lee v. Bickell*, 292 U. S. 415; *Ogden City v. Armstrong*, 168 U. S. 224; and *Gramling v. Maxwell*, 52 F. 2d 256 (W. D. N. C.). Obviously such cases are not applicable as they did not involve the statutory provision being considered here.

The case which the appellant apparently relies on principally is *Allen v. Regents*, 304 U. S. 439, but that case is clearly distinguishable. Not only did the Supreme Court deny the injunction in that case but the regents of the state university who sought the injunction were not the taxpayers but collectors of the admissions taxes involved there. Consequently the principal question was whether the regents, as a state instrumentality, had a right to sue in equity to determine whether the collection of such tax was an unconstitutional burden on a governmental function of Georgia. A majority of the Court held that the suit could be maintained but that does not help the appellant for it is obviously in an entirely different situation. Moreover, as we have just pointed out, the injunction was denied in that case.

Another case strongly relied on by the appellant is *Graham v. du Pont*, 262 U. S. 234, which it cited to show that injunctions are to be denied only when there are mere errors or irregularities in tax assessments. But the quotation which appellant sets out in his brief on page 27 is not, as appellant asserts, a statement from the Supreme Court's opinion. Instead the quotation is taken from the summary of the respondent's argument (p. 246) which is printed with but is not a part of the Supreme

Court's opinion. As the decision therein was rendered in favor of the petitioner, *i.e.*, the former Collector of Internal Revenue, it is apparent that that case is also not helpful to the appellant here.

We submit that from the foregoing the appellant has not shown that it is entitled to the injunctive relief which it requests.

Conclusion.

The decision of the District Court is correct and should be affirmed.

Respectfully submitted,

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Assistant United States Attorney.

June, 1956.

APPENDIX.

Internal Revenue Code of 1954:

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax*.—Except as provided in sections 6212 (a) and (c), and 6213 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 7421.)

28 U. S. C.:

§2201. *Creation of remedy.*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. * * *

Internal Revenue Code of 1939:

SEC. 3403.⁴ TAX ON AUTOMOBILES, ETC.

There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

* * * * *

⁴None of the amendments to Section 3403 are relevant to the issues here involved and the language of the section may be regarded as substantially the same during the entire period in question.

(c) [as amended by Sec. 544 (b) of the Revenue Act of 1941, c. 412, 55 Stat. 687; Sec. 605(c)(1) of the Revenue Act of 1950, c. 994, 64 Stat. 906; and Sec. 481 (c) of the Revenue Act of 1951, c. 521, 65 Stat. 452] Parts or accessories (other than tires and inner tubes and other than radio and television receiving sets) for any of the articles enumerated in subsection (a) or (b), 8 per centum, except that on and after April 1, 1954, the rate shall be 5 per centum. For the purposes of this subsection and subsections (a) and (b), spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, any of the articles enumerated in subsection (a) or (b), shall be considered parts or accessories for such articles, whether or not primarily adapted for such use. * * *

* * * * *

(26 U. S. C., 1952 ed., Sec. 3403.)

Treasury Regulations 46 (1940 ed.), promulgated under the Internal Revenue Code of 1939:

SEC. 316.4. *Who is a manufacturer.*—The term “manufacturer” includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles.

* * * * *

SEC. 316.55. *Definition of parts or accessories.*—The term “parts or accessories” for an automobile truck or other automobile chassis or body, taxable tractor, or motorcycle, includes (a) any article the

primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article, (b) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, and (c) any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use.

The term “parts and accessories” shall be understood to embrace all such articles as have reached such a stage of manufacture that they are commonly or commercially known as parts and accessories whether or not fitting operations are required in connection with installation. The term shall not be understood to embrace raw materials used in the manufacture of such articles.

* * * * *

S. T. 944, 1952-2 Cum. Bull. 255:

Section 3403 (c) of the Code, as amended, imposes, effective November 1, 1951, a tax of 8 percent on the sale by the manufacturer of parts or accessories for vehicles taxable under subsection (a) and (b) of section 3403 of the Code, as amended, except that on and after April 1, 1954, the rate of tax shall be 5 percent. Seat covers for automobiles are considered to be parts or accessories within the meaning of section 3403 (c) of the Code, as amended, and sales thereof by the manufacturer are subject to tax.

The Bureau has issued rulings heretofore that the only circumstances under which the tax does not apply to sales of seat covers by a manufacturer, is where the seat covers are individually designed, cut,

tailored, and fitted by the manufacturer to the automobile belonging to the person who contracts for the performance of such operation, and such person is the consumer of the seat covers. Such rulings provided, however, that the sale of seat covers, similarly produced, to a dealer in new or used automobiles is not a sale for consumption but one for resale, and that the tax attaches to the manufacturer's sale thereof.

Upon reconsideration of the matter, the Bureau is now of the opinion that where a manufacturer furnishes the material and produces automobile seat covers for the consumer thereof, according to individual design and measurement, the sale by the manufacturer of such seat covers is taxable under section 3403(c) of the Code, as amended, regardless of whether they are installed by the manufacturer or by other persons.

The Bureau has issued rulings, as stated above, that sales by a manufacturer of seat covers, produced according to individual design and measurements, to a dealer in new or used cars are not considered sales for consumption, and are subject to tax. The taxability of such sales is not affected by the ruling herein, and tax continues to attach, as in the past, to such sales.

Because of the past rulings of the Bureau concerning the nonapplication of the tax to automobile seat covers which are produced according to individual design and measurement for the consumer thereof, it has been concluded that, under the authority contained in section 3791 (b) of the Code, the ruling set forth herein relating to seat covers so produced will not be applied retroactively with respect to sales of

such seat covers prior to August 18, 1952, the date of this Bulletin, except that any tax which has been paid on the sale of such seat covers will not be refunded, unless in a particular case it is established to the satisfaction of the Commissioner, as required under section 3443 (d) of the Code, that the manufacturer, by reason of relying on an existing ruling that the sale of seat covers so produced was not taxable, did not include in his price any part of the manufacturers' excise tax which he may have subsequently paid on the sale.

No. 14949.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM H. MARTIN, doing business as MARTIN'S AUTO TRIMMING, INC., on behalf of itself and others similarly situated,

Appellant,

vs.

T. C. COLEMAN ANDREWS, as the duly appointed and acting Collector of the Internal Revenue Service of the United States, and ROBERT A. RIDDELL, as Director of the Internal Revenue Service for the Southern District of California,

Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

FILED

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AUG - 2 1956

PAUL P. O'BRIEN, CLERK

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Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

ARGUMENT.

I.

Appellants Reply to Appellees Point One:

(*The District Court correctly held that Appellant is prohibited by Section 2201 of 28 U. S. Code from securing any declaratory relief from imposition of excise taxes.*)

Appellees argue that the *Tomlinson* case, 128 F. 2d 808, does not support appellant's contention that there are ex-

ceptions to the Declaratory Judgment Act. Appellees point out that the court in the *Tomlinson* case specifically limited this exception to a situation where a third party was seeking the injunctive relief, not the taxpayer. There are cases where the courts have assumed that a declaratory judgment may be entered involving federal taxes where there are extraordinary and exceptional circumstances.

Murphy v. Graves, 120 F. 2d 243;

Cassale v. Pedrick, 72 Fed. Supp. 848.

Since the *Miller v. Standard Nut* case, 284 U. S. 498, it has been clearly established that notwithstanding the positive prohibition of Section 7421 of Title 26 of the United States Code, that the courts do have jurisdiction to grant injunctive relief against the assessment or collection of federal taxes where there are "extraordinary and exceptional circumstances." The court in *Murphy v. Graves*, indicated that the same principal of law is applicable where the taxpayer seeks a declaratory judgment. There would seem to be no legal basis for making an exception in the one instance notwithstanding the positive prohibition of Section 7421, Title 26 of the U. S. Code, and then refusing to make a similar exception where the facts warrant it under the declaratory judgment statute.

II.

Reply to Appellees Point Two:

(*The District Court correctly held that the appellant is not entitled to an injunction against the proposed assessment of excise taxes under Section 3403 of the 1939 Internal Revenue Code.*)

Appellees seek to distinguish this case from the case of *Miller v. Nut Margarine*, 284 U. S. 498. They argue that in this case "it is evident that there is a legal possibility of the imposition of a valid tax." This argument is predicated on the assumption that the appellants are in truth manufacturers and that custom made-to-order auto seat covers are in fact automobile accessories. Thus appellees conclude that since there is "definitely a legal possibility that a valid tax can be imposed," this is not a proper case for enjoining the proposed assessment of such a tax.

The facts in this case, however, are markedly similar to the facts appearing in *Miller v. Nut Margarine* (*supra*). In that case, as in the instant case, the taxpayers were advised by the agents of the tax collector's office that their product was not taxable; that the taxpayers consequently made no effort to collect the tax; that the enforcement would impose a tax that the taxpayers would be unable to pay, and that such enforced payment would destroy their businesses.

In the *Miller* case, just as in the present case, the tax collector's office had led the taxpayers to believe that the products in question were not taxable and the taxpayers respectively relied upon these assurances.

In the *Miller* case the Supreme Court said:

“It requires no elaboration of the facts found to show that the enforcement of the act against respondent would be arbitrary and oppressive, would destroy its business, ruin it financially and inflict loss for which it would have no remedy at law.”

The court added:

“It is clear that by reason of the special and extraordinary facts and circumstances, Section 3224, does not apply. The lower courts rightly held respondent entitled to the injunction.”

The *Miller* case enunciated a clear distinction under which the exception to Section 3224 would become applicable.

The Supreme Court expressly recognized the distinction of those cases where the illegality was because of error in the amount of tax as distinguished from cases where the product was not covered by the act at all. Thus in the *Miller* case the court declared that since a valid oleomargarine tax could by no legal possibility be assessed against respondent, that the “reasons underlying Section 3224 apply if at all with little force.” The Supreme Court then concluded that the lower courts had rightly held that the taxpayers were entitled to the injunction.

Moreover in the present case a number of the taxpayers for whom the action was brought, filed affidavits with the court below to the effect that they did not have the funds to pay the tax in question and that if the defendants would enforce payment, such enforcement would destroy their business. These taxpayers were the following: Richard Lambeth, Eugene L. Lessner, and Junius W. Martin.

The Amended Complaint specifically alleged that many of the plaintiffs would actually be forced to close down and liquidate their businesses if the Collector insisted upon payment of the tax, inasmuch as they do not have the funds to pay such a tax.

In both the Second and Third Causes of action it was likewise alleged that the plaintiffs were not manufacturers but were automobile upholsterers. These facts were not contravened by the appellees on the motion to dismiss in any respect whatsoever. Appellants additionally alleged the following:

(1) That over a period of 20 years the men whose responsibility it was to enforce the tax not only failed to assess such a tax, but throughout this period by letters and oral assurances, led the appellants to believe that the only excise tax that was applicable was a tax on automobile seat covers if they were manufactured by pattern and then placed on the shelves to be sold out of stock as a ready made auto seat cover.

2. That the appellants and the various members of appellants' association relied upon these assurances and did not collect any tax from any of their customers.

3. That the enforcement of such a tax at this time would cause many of the members of the appellant association to be forced to close down and liquidate their businesses if the defendants insisted upon payment, inasmuch as they did not have the funds to pay such a tax.

4. That appellants are not manufacturers but are automobile upholsterers; that the sale of custom made-to-order seat covers by an automobile upholsterer is a sale of labor and materials; that the excise tax in question is a manufacturer's tax and that no one of the appellants were or are manufacturers.

These facts clearly state a cause of action. (*Hirst v. Gentsch*, 133 F. 2d 247; *Midwest v. Brady*, 128 F. 2d 496.)

Appellees insist that despite the decision of Miller v. Nut Margarine, the mere illegality of a tax does not give a right to injunctive relief.

In the recent case of *Morris v. United States*, 229 F. 2d 151, the power of the courts to restrain the enforcement of an illegal tax claim was considered, and there the court in its decision specifically recognized that where a tax is illegal, injunctive relief is appropriate. In arriving at this conclusion the court there said:

“But it has long been settled that this general prohibition is subject to exceptions in the case of an individual taxpayer against a particular collector where the tax is *clearly illegal*, or other special circumstances of an unusual character make an appeal to equitable remedies appropriate.” (Emphasis added.)

Apparently it is the appellees contention that in a suit to enjoin collection of a tax, whether the tax is applicable need not be considered, but that consideration must be limited to those factors which indicate the presence or absence of exceptional and extraordinary circumstances.

Appellees are intimating that the inapplicability of the tax is not one of the exceptional and extraordinary circumstances referred to by the decisions. Apparently following this line of reasoning the appellees failed to answer appellants contention that custom made auto seat covers are not taxable as accessories.

In *Holland v. Nix*, 214 F. 2d 317, the plaintiff obtained from the District Court a judgment enjoining the tax

collector from enforcing a certain assessment. At the hearing on the Order to Show Cause no controverting evidence was offered by the government. In upholding the lower court's decision the Appellate Court said:

“As was stated by the Supreme Court in *Miller v. Standard Nut*, 284 U. S. 498, and in subsequent decisions, Section 3653 is general in its terms and should not be construed as abrogating the equitable principles which permit suits to restrain collection where the exaction is illegal (as we think here) or there exist, special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisdiction. (See also *Shelton v. Gill*, 202 Fed. 2d 503.) It is our opinion that the trial court was correct and the judgment should be affirmed.”

In that decision therefore, as well as the case of *Morris v. United States*, the court recognized that illegality, to wit: inapplicability was a ground for injunctive relief as distinguished from the special and extraordinary circumstances referred to by the appellees.

The liberal interpretation of the statute in favor of the taxpayer indicated in *Miller v. Standard Nut*, has been applied in many other cases. Thus the taxpayers have been allowed to enjoin collection of federal taxes in *Shelton v. Gill*, 202 F. 2d 503; *Hirst & Co. v. Gentsch*, 133 F. 2d 247; *Midwest v. Brady*, 128 F. 2d 496; and in other cases cited by appellant.

Other exceptions to the enforcement of this statute have also been found in *Lipke v. Lederer*, 259 U. S. 557; *Regal Drug v. Wardell*, 260 U. S. 386; *Hill v. Wallace*, 259 U. S. 44; *Rickert Rice Mills v. Fontenot*, 297 U. S. 110.

The facts in this case are also analogous to the facts in the case of *Allen v. Regents*, 304 U. S. 439. There the Supreme Court said: "That resort to equity was justified where the tax was one which the taxpayer was not lawfully required to collect."

In *Midwest Haulers v. Brady*, and in *Hirst v. Gentsch*, *supra*, complaints for equitable relief were upheld based upon allegations that the taxes which the collector was seeking to enforce were "probably" not validly assessed. (Emphasis added.)

These cases refute appellees contention that injunctive relief is necessarily limited to situations where there is "no legal possibility" that a valid tax can be imposed.

In a decision handed down on April 24, 1956, the District Court of Virginia held that a plaintiff engaged in an identical method of operation, such as the appellants in this case, was not a manufacturer of accessories within the meaning of the statute but was engaged in merely selling labor. H. H. KEETON, JR. trading and doing business as *Virginia Auto Top Company v. The United States of America*, No. 2194, and is attached hereto as an addendum to this reply brief.

Whether custom made-to-order seat covers are accessories within the meaning of Section 3403(c) of the Internal Revenue Code of 1939, or are the sale of labor and materials, is now before this court in the case of *Hirasuma v. McKinney*. In that case, of course, the lower court contrary to the decision in the *Keeton* case, held that seat covers were accessories and were subject to excise tax.

In *Johnny & Mack v. United States*, 123 Fed. Supp. 400, the District Court held that the sales of custom made-

to-order seat covers are sales of labor and materials and are not sales as accessories. In that case the government attempted to make the same distinction claimed by the tax collector in this case that custom made-to-order auto seat covers sold to dealers are subject to tax, although similar sales to retail customers were not. The court in the *Johnny and Mack* case disposed of this contention and held that the sales of the seat covers were sales of labor and materials and not sales of seat covers as accessories, regardless as to whether the purchaser is an individual automobile owner or is a new or used car dealer. That the court in the *Johnny and Mack* case rendered a decision that was consistent with the opinion of the excise tax division of the government, is shown in a letter issued by R. J. Bopp, Chief of the Excise Tax Division in Washington. In this letter Mr. Bopp states

“we agree with the court’s conclusion of law that the distinction drawn between sales of seat covers made to order to individual automobile owners and new and used car dealers, is an unwarranted distinction.” [Clk. Tr. p. 70.]

Mr. Bopp’s letter then went on to assert that he disagreed with the court’s view that the sales of seat covers were sales of labor and material. That the Internal Revenue Department, however, has taken an inconsistent position in interpreting an identical method of operation involving the sale of glass by glass shops is shown by a letter issued by Charles J. Valaer, Deputy Commissioner to Paul R. Rioth, set forth in the Clerk’s Transcript on page 84.

In that letter the Commissioner of Internal Revenue acknowledged that no distinction would be made in the sale of glass, whether to a retail customer or to a new

or used car dealer. The Commissioner of Internal Revenue therefore has interpreted the sale of glass when immediately installed on an automobile as being a transaction involving the sale of labor and material, and not the sale of an automobile part or accessory. No valid reason exists for determining that a sale of glass when immediately installed is deemed to be a transaction involving the sale of labor, whereas a seat cover made to order and likewise immediately installed, should be held to be the sale of an accessory.

Although Mr. Bopp in his letter mentions that the Internal Revenue Department had previously issued a ruling that custom made seat covers sold to dealers were taxable, such a ruling as is pointed out in the briefs of the *Hirasuma* case was an unpublished ruling and was apparently unknown in California. This is borne out, furthermore, by the fact that at no time prior to August 18, 1952, did the office of the Internal Revenue Department take any steps to enforce payment of the excise tax on custom made-to-order seat covers in the State of California. Conversely as shown by the record in this case the persons whose duty it was to enforce this tax in the State of California made it known that no such tax was applicable.

The Appellant also relies on the case of *United States v. Leslie Salt*, 76 S. Ct. 416, referred to by appellant Hirasuma in his closing brief. There, the court said,

“administrative practice consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of this command is indefinite and doubtful * * * The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with

the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.”

It is respectfully submitted to this Honorable Court that both by reason of the many opinions and interpretations placed upon custom made-to-order seat covers by agents of the appellees to the appellants who were thus led to believe, and did believe, that custom made-to-order seat covers were not taxable, as well as the realistic interpretation made by the court in the *Keeton* case, holding that custom made-to-order seat covers are a sale of labor and not the sale of an accessory that this court should conclude that the tax which the appellees propose to assess against the appellants is an illegal tax, which does not apply to any of the appellants, and that in addition thereto, extraordinary and exceptional circumstances have sufficiently been shown to justify injunctive relief.

It is respectfully submitted that the decision of the District Court dismissing the complaint and in denying injunctive relief should be reversed.

PHILL SILVER,

Attorney for Appellant.

ADDENDUM.

In the United States District Court for the Eastern District of Virginia, Richmond Division.

H. H. Keeton, Jr., trading and doing business as Virginia Auto Top Company v. The United States of America. Civil Action No. 2194.

OPINION.

The plaintiff owns and operates a proprietorship in Richmond, Virginia, under the name of Virginia Auto Top Company. Plaintiff's business, among other things, consists of selling seat cover material to a customer, and then installing or fashioning such material into a seat cover in said customer's automobile. This portion of plaintiff's business is commonly referred to and known as the custom seat cover business. Plaintiff carries no stock of seat covers and only cuts and installs the desired material upon order of the customer. However, plaintiff does carry a varied stock of material. After the customer chooses his desired material from the stock, plaintiff places it on the seats and backrests of the customer's car, marks the material, then removing the material from the car, it is cut to fit. The cut material is then sewn together and fastened to the seats and backrests of the automobile. The price to the customer is fixed by the price of the material plus a mark up for labor and profit.

The Internal Revenue Service of the United States, hereinafter referred to as the defendant, on and after August 8, 1952, assessed an excise tax on all seat covers so made by the plaintiff. This was the manufacturer's tax on automobile accessories sold by the manufacturer under Section 3403 (c), Title 28, U. S. C. A., 1939. Plaintiff paid a total of \$640.39 in the period 1952 through the

calendar year 1953, and thereafter filed claim for refund. The refund having been denied plaintiff brings this action.

Plaintiff contends that he is not a manufacturer of automobile accessories within the meaning of Title 28, Section 3403(c), U. S. C. A., of the Internal Revenue Code, 1939. It is his position that he sells seat cover materials and merely performs the labor of installing that material on the automobile of his customer. Hence he is not a manufacturer within the meaning of Section 3403(c), *supra*.

The word "accessory" is the statute has been held to include electric cigarette lighters, seat covers, electric storage batteries, etc. *Masterbile Products Corp. v. U. S.*, 42 Fed. Supp. 294; *Crawford Manufacturing Co. v. U. S.*, 50 Fed. (2d) 280; *Universal Battery Co. v. U. S.*, 281 U. S. 580, at 583-584. In the late case (1955), *Masao Hirasuna v. McKinney*, 135 Fed. Supp. 897, seat covers were held to be an accessory within the meaning of Section 3403(c). Thus I think it is clear that seat covers, as such, are within the meaning of the word "accessory" in the statute.

However, the crux of the matter in this case resolves itself to the question of whether the type of operation here involved may be construed to be manufacture within the meaning of Section 3403(c), *supra*. The *Hirasuna* case, *supra*, a Hawaiian case, holds that custom seat covers do come within the meaning of the word "manufacturer" in the statute. In that case the taxpayer ran a business identical in all respects to the business of the plaintiff in the case at bar. The Court held that the seat cover materials were raw materials and that the taxpayer had manufactured the seat covers, *i. e.*, "We find that seat covers were in fact manufactured, for the cars came out of the

shop with seat covers where there were none in the shop when the cars were driven in.” (135 Fed. Supp., at 900.)

I am unable to accept the reasoning of the learned judge in this respect. The cases cited *supra* on what an “accessory” is, all deal with tangible objects which are complete units prior to attachment to the automobile. The Internal Revenue Service has always differentiated between manufacture and installation even to the extent of prorating the retail cost, basis of the excise tax, to per cent of cost for the manufactured article and per cent of cost for the labor and installation. They then tax that portion which is manufactured and do not tax that portion which is labor and installation. Thus the accessory, as such, is clearly distinguishable from the labor necessary to make it a functioning part of the car. There are three steps necessary before the accessory becomes a part of the car, *i. e.*, (a) the raw materials, (b) the actual manufacture of the raw materials into a finished useful object, and (c) the installation of this object on to the automobile. If the three-step test is applied here, then the raw materials would be those materials that went into the fabric itself, the bolt of fabric would be the “manufactured” object, *i. e.*, the “accessory”, and the cutting and attaching to the automobile of the fabric would be the installation. Actually, in the case at bar plaintiff is concerned only with the last two steps. He acquires the bolt of fabric from the manufacturer and he then applies this fabric, selected by the customer, to the customer’s car. This principle is illustrated in the case of Bacon and Van Buskirk Glass Co. v. Luckenbill, 55-1 U. S. T. C., Par. No. 49, 124 (S. D. Ill., 1955), where the plaintiff was in the retail glass business. Plaintiff there would cut from a large plate of glass, glass for a windshield, and then install it in the

customer's car. The Court did not write an opinion but based its holding on the fact that plaintiff did not manufacture the glass, but only cut it to size and installed it. The Bacon and Van Buskirk case, *supra*, was followed in the case of Cotter v. Luckenbill, 55-2 U. S. T. C., Par. No. 9698 (S. D. Ill., 1955).

The United States District Court of Connecticut, in 1926 decided the case of John J. Roche Co. v. Eaton, 14 Fed. (2d) 857. The facts in that case were essentially on all fours with the case at bar except that the plaintiff in the Roche case performed auto repairs in addition to custom slip covers. The Internal Revenue Service has undertaken to distinguish the Roche case from the type of case at bar. However, I think they are undistinguishable and that the conclusions in the Roche case are sound. In the Roche case the Court uses language appropriate to the instant case: "I hold that the dominant aspect of the transaction engaged in by the plaintiff was that of work performed. Materials were, of course, supplied; but the fact that these materials were not manufactured *en masse*, but were fashioned specially in each instance for a specific customer, makes the furnishing of them but an incident of the major transaction."

In view of the foregoing reasoning I hold that the work done by plaintiff does not come within the meaning of Section 3403(c), *supra*, and consequently plaintiff is not a manufacturer of auto accessories within the meaning of the statute.

Judgment for the plaintiff in the sum of \$640.39 will be granted upon presentation of appropriate order.

(SGD.) STERLING HUTCHESON
United States District Judge.

April 24, 1956.

No. 14953

United States
Court of Appeals
for the Ninth Circuit

JOHN O. ENGLAND, Trustee of the Estate of
Daniel E. Sanderson, Bankrupt,
Appellant,
vs.

DANIEL E. SANDERSON, Bankrupt,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern
District of California, Southern Division

FILED

MAR - 8 1956

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the Northern District of California, Southern Division

In Bankruptcy—No. 42844

In the Matter of DANIEL E. SANDERSON,
Bankrupt.

DEBTOR'S PETITION

To the Honorable Judge of the United States District Court for the Northern District of California:

The Petition of Daniel E. Sanderson, residing at 940 Potrero Avenue, San Francisco 10, California, City and County of San Francisco, State of California, by occupation a building contractor, respectfully represents:

1. Your petitioner has had his principal place of business at San Francisco, California, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Your petitioner owes debts and is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

3. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and

places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore, your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said Act.

/s/ DANIEL E. SANDERSON,
Petitioner

/s/ JEFFERSON E. PEYSER,
Attorney

State of California,
City and County of San Francisco—ss.

I, Daniel E. Sanderson, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

/s/ DANIEL E. SANDERSON,
Petitioner

Subscribed and sworn to before me this 12th day of April, 1954.

[Seal] /s/ SELMA WOLFF,
Notary Public in and for said City and County and State.

[Endorsed]: Filed April 12, 1954.

[Title of District Court and Cause.]

ORDER OF ADJUDICATION AND
REFERENCE, ETC.

At San Francisco, in said District, on the 13th day of April, 1954.

The Petition of Daniel E. Sanderson, filed on the 12th day of April, 1954, that he be adjudged a bankrupt under the Act of Congress relating to Bankruptcy, having been heard and duly considered, and no opposition being made thereto,

It Is Adjudged that the said Daniel E. Sanderson is a bankrupt under the Act of Congress relating to Bankruptcy.

It Is Ordered that the above-entitled proceeding be, and it is hereby referred to Burton J. Wyman, one of the Referees in Bankruptcy of this Court who will be in charge thereof, and to Bernard J. Abrott, Referee in Bankruptcy of this Court, in the event Burton J. Wyman shall be unable to act to take such further proceedings therein as are required and permitted by said Act, and that the said

Daniel E. Sanderson shall henceforth attend before the said Referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

It Is Further Ordered that all notices required to be published in the above-entitled matter, and all orders which the Court may direct to be published, be inserted in "The Recorder," a newspaper published in the County of San Francisco, State of California, within the territorial district of this Court, and in the County within which said bankrupt resides.

Dated: April 13th, 1954.

/s/ GEORGE B. HARRIS,
District Judge

[Endorsed]: Filed April 13, 1954.

[Title of District Court and Cause.]

TRUSTEE'S REPORT OF EXEMPT PROPERTY

To Hon. Burton J. Wyman, Referee in Bankruptcy:

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid as his own property, under the provisions of the Act of Congress relating to bankruptcy, as his exemptions allowed by law and claimed by him

in his schedules filed in the above entitled proceeding:

General Head—Particular Description	Estimated Value
Property claimed to be exempt by State laws, with reference to the statute creating the exemption:	
C. C. P. 690.2—Household furniture, furnishing and wearing apparel	\$ 1,500.00
C. C. P. 690.1—Chairs, tables, desks and books.....	200.00
C. C. P. 690.17—Building materials	200.00
C. C. P. 690.19—New York Life Insurance Co. Policy No. 21703765, John Hancock Mutual Life insurance Co., Policies No. 32250707 and 33575504, Independent Order of Foresters Policy No. 1138806-0.....	1,271.97
C. C. P. 690.24—1947 GMC $\frac{3}{4}$ ton truck.....	225.00
C. C. 1260—Homestead in residence and apartment building located at 940 Potrero Avenue, San Francisco, California	7,500.00
Total.....	<u>\$10,896.97</u>

Dated this 21st day of July, 1954.

/s/ JOHN O. ENGLAND,
Trustee

[Endorsed]: Filed July 22, 1954.

[Title of District Court and Cause.]

BANKRUPT'S OBJECTION TO TRUSTEE'S REPORT OF EXEMPT PROPERTY

To the Honorable Burton J. Wyman, Referee in
Bankruptcy:

The bankrupt objects to the determination of the Trustee set forth in his report of exempt property filed on the 22nd day of July, 1954, upon the ground

that the Trustee failed to set apart to the bankrupt the following described property, to wit:

1. Tools and implements of the bankrupt necessary to carry on his trade, including, but not being limited to, the following:

1-14" band saw, 1-8" table saw, 1-6" planer, 1-11/2 h.p. Duplex cut-off saw, 2 Skill saws, 6 picks, 6 shovels, 3 wrecking bars, 1 sledge hammer, miscellaneous small tools: hammer, saw, hand plane, screwdrivers, drills, bit, etc.

2. Typewriter and other mechanical contrivances and office equipment used by the bankrupt for making his living, including, but not being limited to, the following:

1 typewriter, 1 adding machine, 1 check protector and 1 recording calculator.

Said property is exempt under Section 690.4 of the Code of Civil Procedure of the State of California, and claim for such exemption was heretofore made by the bankrupt in Schedule B-5 of his Schedule of Assets and Liabilities.

The bankrupt further objects to the estimated value of Seven Thousand, Five Hundred Dollars (\$7,500) set out in said Trustee's report for the bankrupt's homestead exemption in the residence and apartment building located at 940 Potrero Avenue, San Francisco, California, and the bankrupt alleges that the value of said homestead exemption should be set at Twelve Thousand, Five Hundred Dollars (\$12,500) in accordance with the provisions of Section 1260 of the Civil Code of the State of California and in accordance with the claim for

such exemption heretofore made by bankrupt in said Schedule B-5 of his Schedule of Assets and Liabilities.

/s/ DANIEL E. SANDERSON,
Bankrupt

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 29, 1954.

[Title of District Court and Cause.]

SUMMARY OF RECORD AND FINDINGS OF
FACT RELATIVE TO BANKRUPT'S EX-
EMPTIONS, HOMESTEAD AND OTHER-
WISE

This bankruptcy court is called upon to deal with certain exemption questions (homestead and otherwise) upon a record summarized herein as follows:

On February 26, 1954, Daniel E. Sanderson executed and acknowledged, before a notary public, in the City and County of San Francisco, State of California and, on the same date, caused to be, and there was, recorded in Book 6326, Page 556 of Official Records, in the office of the Recorder of said city and county, a certain "Declaration of Homestead" which read and reads, as follows:

"Know All Men By These Presents:

"I, Daniel E. Sanderson, do hereby declare:

"That I am the head of a family; that I am a

married man, and the name of my wife is Ona Mae Sanderson; that my family consists of my said wife;

“That I do now, at the time of making this declaration, actually reside on the land and premises hereinafter described and it is my intention to use the same as a home;

“That the premises on which I so reside are that certain lot, piece or parcel of land situate, lying and being in the City and County of San Francisco, State of California, and bounded and described as follows, to wit:

“Beginning at a point on the Westerly line of Potrero Avenue, distant thereon one hundred and ninety-five (195) feet Southerly from the Southerly line of Twenty-first Street; running thence Southerly and along said line of Potrero Avenue twenty-five (25) feet; thence at a right angle Westerly one hundred (100) feet; thence at a right angle Northerly twenty-five (25) feet; thence at a right angle Easterly one Hundred (100) feet to the point of beginning.

“Being a portion of Mission Block Number 145, together with the dwelling house and the outbuildings thereon;

“That I do, by these presents, claim the premises above described, together with the dwelling house and the outbuildings thereon, as a homestead; that all of said property is necessary to the use and enjoyment of said homestead;

“That the character of said property sought to be homesteaded is as follows:

Separate property of declarant

“That no former declaration of homestead has been made

“That the actual cash value of said premises I estimate to be \$20,000.00, Twenty thousand dollars.

“In Witness Whereof I have hereunto set my hand his 26th day of February, one thousand nine hundred and fifty-four.

“Daniel E. Sanderson”

Appended to, and as a part of said Declaration of Homestead, when said Declaration of Homestead so was recorded, was, and now is, the following affidavit:

“State of California,

“City and County of San Francisco—ss.

“Daniel E. Sanderson, being duly sworn, deposes and says:

“That he is the declarant named in and who makes the within and annexed declaration of homestead; that he has read the same and knows the contents thereof, and that the matters therein stated are true of his own knowledge.

“Daniel E. Sanderson

Subscribed and sworn to before me this 26th day of February, 1954.

[Seal]

Selma Wolff,

Notary Public in and for the City and County of San Francisco, State of California”

On April 12, 1954, Daniel E. Sanderson filed his initial petition in bankruptcy, in the above entitled court, and on the following day, April 13, 1954, was adjudged, by said court, a bankrupt.

In his schedules in bankruptcy, filed coincidentally with his initial bankruptcy petition, Daniel E. Sanderson claimed certain personal property exempt, under certain therein-specified statutes of the State of California, i.e., under section 690.2 of the California Code of Civil Procedure, "Household furniture, furnishings and wearing apparel", of the value of \$1,500.00; under section 690.4 of the same Code, "Tools of debtor necessary to carry on his trade—saws, planes, hammers, picks, shovels and miscellaneous tools", of the value of \$600.00; under sections 690.1 and 690.4 of the same Code—"Desks, chair, typewriter and other office equipment used for making debtor's living", of the value of \$600.00; under section 690.17 of the same Code—"Building materials", of the value of \$200.00; under section 690.19 of the same Code—"Life insurance benefits under certain policies having a total cash surrender value of \$1,271.97, the aggregate annual premiums of which amount to \$117.44; under section 690.24 of the same Code—"1947 GMC $\frac{3}{4}$ ton truck" of the value of \$225.00; under section 1260 of the California Civil Code, "Homestead in residence and apartment building located at 940 Potrero Avenue, San Francisco, Calif., used by debtor and his wife as a residence" as to which a homestead exemption to the extent of \$12,500.00 also was, and is, claimed.

On July 22, 1954, John O. England, as the duly

elected, qualified and acting trustee of the estate of the bankrupt, filed "Trustee's Report of Exempt Property" wherein, and whereby, the following items, claimed as exempt as aforesaid, were allowed, and set apart to the bankrupt, as exempt:

Household furniture, furnishings and wearing apparel, of the estimated value of \$1,500.00; chairs, tables, desks and books, of the estimated value of \$200.00; building materials in the sum of \$200.00; New York Life Insurance Co., Policy No. 21703765, John Hancock Mutual Life Insurance Co., Policy Nos. 32250707 and 33575504 and Independent Order of Foresters, Policy No. 1138806-0, of the aggregate estimated value of \$1,271.97; 1947 GMC $\frac{3}{4}$ ton truck, of the estimated value of \$225.00 and the "Homestead in residence and apartment building located at 940 Potrero Avenue, San Francisco, California," of the estimated value of \$7,500.00.

On July 29, 1954, there also was filed, in the above entitled bankruptcy proceeding, "Bankrupt's Objection to Trustee's Report of Exempt Property" in which the bankrupt objected to the determination as made by trustee on the grounds that the trustee failed to set apart, to the bankrupt, the following described property, (1) Tools and implements of the bankrupt necessary to carry on his trade, including, but not being limited to, 1-14" band saw; 1-8" table saw; 1-6" planer; 1-1 $\frac{1}{2}$ h.p. Duplex cut-off saw; 2 Skill saws; 6 picks; 6 shovels; 3 wrecking bars; 1 sledge hammer, miscellaneous small tools; hammer, hand plane, screwdrivers, drills, bit, etc. (2) Typewriter and other mechanical contriv-

ances and office equipment used by the bankrupt for making his living, including, but not being limited to, 1 typewriter, 1 adding machine, 1 check protector and 1 recording calculator, all of said above mentioned property (as stated in substance in said "Objection") having been claimed as exempt in the aforesaid bankruptcy schedules, under the provisions of section 690.4 of the California Code of Civil Procedure.

In said "Objection", the bankrupt further objected that the trustee should have set aside the claimed homestead exemption to the extent of \$12,500.00, in valuation, instead of to the extent only of \$7,500.00, in valuation.

The aforesaid report of the trustee and the objections thereto came on for hearing before the undersigned referee in bankruptcy on August 4, 1954, after due notice to the directly interested persons, at which said time Pierce N. Stein, Esq., representing Jefferson E. Peyser, Esq., the attorney of record of the bankrupt, appeared on behalf of the bankrupt and Daniel Aronson, Jr., Esq., representing Messrs. Shapro & Rothschild, the attorneys for the trustee, appeared on behalf of said trustee, and, after the only witness (the bankrupt) had been sworn and testified, under oath, on direct examination by his counsel and counsel, appearing on behalf of the trustee, had announced that he did not desire to cross examine the witness, the matter was submitted for decision, and the court now being advised fully in the premises finds:

1. That, for about nine (9) years prior to the

filing of the initial bankruptcy petition in the above entitled bankruptcy proceeding, the occupation of Daniel E. Sanderson, now the bankrupt herein, was that of a building contractor; that such was his occupation, at all times subsequent to, and at the time of the filing of said initial bankruptcy proceeding; that, at all times since the filing of said initial bankruptcy proceeding, said bankrupt's occupation has been that of a building contractor; that at the time of the filing of the aforesaid initial petition in bankruptcy, said bankrupt was, and that at all times since the filing of said initial petition said bankrupt has been, using all the personal property (which the trustee herein did not set apart to the bankrupt as exempt) in earning his living at his occupation of said building contractor and that all said last mentioned personal property is needed by said bankrupt in earning his living as a building contractor.

2. That the aforesaid "Declaration of Homestead" was, as aforesaid, recorded on February 26, 1954, at which time Section 1260 of the California Civil Code read that a homestead of a valuation of not to exceed \$12,500.00 could be allowed a head of a family, as was, and is the bankrupt herein.

3. That Daniel E. Sanderson commenced the above entitled bankruptcy proceeding on April 12, 1954, when, as aforesaid, he filed his initial bankruptcy petition in the above entitled court.

4. That Daniel E. Sanderson was adjudged a bankrupt on April 13, 1954.

5. That continuously, since 1898, when the bank-

ruptcy Act under which said above entitled bankruptcy proceeding was commenced, and now is being carried forward, Section 6 of said Act [11 USCA, §24] read (as it still reads and also it read on the date of the filing of the aforesaid initial bankruptcy petition): "This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State* * *"

6. That there was at least one creditor of the bankrupt who still is interested in the herein bankruptcy proceeding and who became such creditor prior to the time that the California Legislature amended (1953) changing the allowable homestead to a head of a family (as is the bankrupt herein) from \$7,500.00, in actual cash value, to \$12,500.00, in actual cash value.

Therefore, in accordance with all the facts found in the above entitled bankruptcy proceeding and particularly as found in connection with the specific matters relative to the claim of exemptions (homestead and otherwise), "Trustee's Report of Exempt Property" and "Bankrupt's Objection to Trustee's Report of Exempt Property" and also in accordance with the opinion and conclusions of the undersigned referee in bankruptcy.

Let It Be Ordered, Adjudged and Decreed.

Dated: February 10, 1955.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy

There also was filed herein, on said last mentioned date, the order, judgment and decree which was, and is, as follows:

ORDER, JUDGMENT AND DECREE RELATIVE TO BANKRUPT'S CLAIMED EXEMPTIONS (HOMESTEAD AND OTHERWISE)

Whereas, this bankruptcy court this day has filed herein its summary of record, findings of fact, opinion and conclusions of law

Now, Therefore, in Accordance Therewith,

It Hereby Is Ordered, Adjudged and Decreed:

1. That, insofar as the "Trustee's Report of Exempt Property" herein contains nothing in conflict with the findings of fact, opinion and conclusions of law hereinbefore mentioned, said "Trustee's Report of Exempt Property" be, and it is, Approved and Confirmed.

2. That, insofar as said last mentioned report does contain any statement, or statements, that is in conflict with anything contained in the aforesaid findings of fact, opinion and conclusions of law, said last mentioned report be, and it is Disapproved and Unconfirmed.

3. That, in addition to the items of personal property heretofore set apart to the bankrupt, as exempt, there be, and there is, also set apart to the bankrupt, as exempt, under Section 690.4 of the California Code of Civil Procedure, supplemented by Section 6 of the Bankruptcy Act [11 USCA, §24], the following additional personal property:

1. Tools and implements of the bankrupt necessary to carry on his trade, including, but not being limited to, the following:

1-14" band saw, 1-8" table saw, 1-6" planer, 1-11½ h.p. Duplex cut-off saw, 2 Skill saws, 6 picks, 6 shovels, 3 wrecking bars, 1 sledge hammer, miscellaneous small tools; hammer, saw, hand plane, screwdrivers, drills, bit, etc.

1. Typewriter and other mechanical contrivances and office equipment used by the bankrupt for making his living, including, but not being limited to the following:

1 typewriter, 1 adding machine, 1 check protector and 1 recording calculator.

4. That the homestead claimed by the bankrupt herein be, and said homestead is, not to exceed \$12,500.00 in cash value, under the provisions of Section 1260 of the California Civil Code (as amended in 1953), supplemented by Section 6 of the Bankruptcy Act [11 USCA, §24] set apart to the bankrupt as exempt.

5. That said homestead, so set apart to the bankrupt as exempt, is particularly described as follows:

That certain lot, piece or parcel of land situate,

lying and being in the City and County of San Francisco, State of California, and bounded and described as follows, to wit:

“Beginning at a point on the Westerly line of Potrero Avenue, distant thereon one hundred and ninety-five (195) feet Southerly from the Southerly line of Twenty-first Street; running thence Southerly and along said line of Potrero Avenue twenty-five (25) feet; thence at a right angle Westerly one hundred (100) feet; thence at a right angle Northerly twenty-five (25) feet; thence at a right angle Easterly one hundred (100) feet to the point of beginning.

“Being a portion of Mission Block Number 145.”

Dated: February 10, 1955.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy

On March 14, 1955, the following verified “Petition for Review” was filed herein:

“Comes now John O. England, Trustee of the above-named estate, and respectfully represents:

“That heretofore and on the 19th day of February, 1955, Hon. Burton J. Wyman, Referee in Bankruptcy, herein made and entered herein that certain ‘Summary of Record and Findings of Fact Relative to Bankrupt’s Exemptions, Homestead and Otherwise’, a full and true copy of which is hereto annexed, marked Exhibit ‘A’, specifically referred to and made a part hereof; that certain ‘Opinion

and Conclusions of Law Relative to Bankrupt's Exemptions Rights, Homestead and Otherwise,' a full and true copy of which is hereto annexed marked Exhibit 'B', specifically referred to and made a part hereof; and that certain 'Order, Judgment and Decree Relative to Bankrupt's Claimed Exemptions (Homestead and Otherwise)', a full and true copy of which is hereto annexed and marked Exhibit 'C', specifically referred to and made a part hereof; that the aforesaid Referee's Order so made and entered herein on the said 10th day of February, 1955, was and is erroneous and contrary to law in each and all of the following particulars:

"1. That neither said Referee's Order nor his said conclusions are supported by and, in fact, are contrary to the evidence adduced and to the records, papers and files herein.

"2. That the conclusion of law made by said Referee and numbered 1 is contrary to law and not supported by valid findings of fact, and/or is not supported by the records, papers and files herein in that a building contractor is not a mechanic or artisan as set forth in Section 690.4 of the Code of Civil Procedure of the State of California.

"3. That of said conclusions of law made by said Referee, that numbered 2 is contrary to law and not supported by valid findings of fact, and/or not supported by the records, papers and files herein in that at and before the time that Section 1260 of the Civil Code of the State of California was amended to increase the homestead exemption from

\$7500 to \$12,500.00, said Bankrupt had at least one creditor who was then and at the time of the filing of the original Petition herein, and who still is a creditor and therefore the homestead claimed by the Bankrupt may not exceed the sum of \$7500.00 in actual cash value.

“Wherefore, your Petitioner prays that the aforesaid Referee’s Order made and entered herein on the said 10th day of February, 1955, may be, by the Judge of the above-entitled Court reviewed and reversed; and that said Referee in Bankruptcy be, by the said Judge, directed to overrule the Bankrupt’s Objections to Trustee’s Report of Exempt Property, after due proceedings to be had herein in accordance with Section 39 (c) of the Bankruptcy Act; or for such other, further or different Order or relief as to this Honorable Court may seem just and proper in the premises.

/s/ JOHN O. ENGLAND
SHAPRO & ROTHCHILD,

/s/ By DANIEL ARONSON, JR.,
Attorneys for Trustee”

[For the sake of brevity and in order to avoid unnecessary repetition, there are four omissions herefrom in connection with the aforesaid “Petition for Review: (1) the verification attached to said petition for review; (2) the therein referred to “Exhibit ‘A’” which is a copy of said “Summary of Record”, the original of which heretofore has been inserted herein; (3) the therein referred to

“Exhibit ‘C’” which is a copy of said “Order, Judgment and Decree”, the original of which hereinbefore has been inserted herein, and (4) the therein referred to “Exhibit ‘B’” which is a copy of said “Opinion and Conclusions”, the original of which immediately follows.]

[Endorsed]: Filed February 10, 1955.

[Title of District Court and Cause.]

OPINION AND CONCLUSIONS OF LAW RELATIVE TO HEREIN BANKRUPT'S EXEMPTION RIGHTS, HOMESTEAD AND OTHERWISE

This bankruptcy court is called upon to deal herein with exemption rights (homestead and otherwise) under the following set of facts:

(a) Daniel E. Sanderson, represented in the above entitled bankruptcy proceeding by Jefferson E. Peyser, Esq., filed his initial petition to be adjudged a bankrupt, in the above entitled United States District Court for the Northern District of California, on April 12, 1954, and, on April 13, 1954, so was adjudged.

(b) In his schedules, the bankrupt claimed, as exempt, certain items of personal property, under the provisions of Section 690 (and various subsections of said last mentioned section) of the California Code of Civil Procedure.

(c) The bankrupt, in said schedule, also claimed exempt a certain homestead, to the extent of \$12,-

500.00, in valuation, under the provisions of Section 1260 of the California Civil Code, as amended, by the California Legislature in 1953.

(d) The trustee in bankruptcy herein, by "Trustee's Report of Exempt Property", set apart to the bankrupt, as exempt, all the items of personal property claimed, as exempt, by said bankrupt, as aforesaid, except certain items so claimed under Section 690.4 of the California Code of Civil Procedure.

(e) The trustee, in said exempt-property report, also set apart to the bankrupt, as exempt, the aforesaid homestead, but only to the maximum extent of \$7,500.00 in valuation, instead of to the maximum extent of \$12,500.00, in valuation, as claimed by the bankrupt.

(f) On July 29, 1954, there was filed, in the above entitled bankruptcy proceeding "Bankrupt's Objection to Trustee's Report of Exempt Property", in which the bankrupt objected to the trustee's failure to set apart, as exempt, the said items of personal property, under the provisions of Section 690.4 of the California Code of Civil Procedure, also, objected to the trustee's failure to set apart, as exempt, the aforesaid homestead to the extent of \$12,500.00, in valuation, and, in addition, made the claims that said last mentioned items in personal property and said homestead, to the extent of \$12,500.00, in valuation, should be set apart to him, as exempt.

(g) There, at least, is one of the creditors who still is interested in the herein bankruptcy proceeding who became such creditor prior to, and who

was such creditor on, the date upon which the California Legislature, by the aforesaid amendment of Section 1260 of the California Civil Code (in 1953) increased the homestead permitted to a head of a family (as is the bankrupt herein) from \$7,500.00, in valuation, to \$12,500.00, in valuation.

Consequently, as the result of the hearing heretofore held herein (at which said hearing Pierce N. Stein, Esq., representing Jefferson Peyser, Esq., the attorney of record of the bankrupt, and Daniel Aronson, Jr., Esq., representing Messrs. Shapro & Rothschild, the attorneys of record for John O. England, the trustee of the herein bankrupt estate, were present and participated in said hearing) the following two major questions are presented for consideration and determination:

1. Is the herein bankrupt legally entitled to an order, of this bankruptcy court, exempting, under Section 690.4 of the California Code of Civil Procedure supplemented by Section 6 of the Bankruptcy Act [11 USCA, §24], the items of personal property claimed exempt by said bankrupt, but not set apart to him by the trustee herein? and

2. Is the herein bankrupt legally entitled to a further order, of this bankruptcy court, exempting, under Section 1260 of the California Civil Code, supplemented by Section 6 of the Bankruptcy Act [11 USCA §24], the homestead now claimed by the bankrupt, to the extent of \$12,500.00 in valuation?

I.

Bearing in mind that exemption-statutes, being

remedial in character, generally, are to be given the most liberal construction that the facts and the applicable law involved possibly will permit¹ and such, unquestionably, should be the attitude of bankruptcy courts in construing the Bankruptcy Act wherein bankrupts' rights, under such Act are being considered²—the bankruptcy court herein concludes, as a matter of law, (and such, in the end, will be the holding herein) that the herein bankrupt is entitled, not only to have set apart to him, as exempt, the items of personal property which the herein trustee heretofore so has set apart to the bankrupt, but also, under Section 690.4 of the California Code of Civil Procedure, supplemented by Section 6 of the Bankruptcy Act [11 USCA, §24], as aforesaid, is entitled, in addition, to have set apart to him, as exempt, the other items of personal property described in, and sought by, bankrupt's schedules in bankruptcy and by "Bankrupt's Objection to Trustee's Report of Exempt Property."

¹ " * * * statutes creating the right of exemption are subject to the rule of liberal construction, and are generally subject to the most liberal construction which the courts can possibly give them." *Dean vs. Shephard* (C.C.A. 9) 26 F. (2d) 460, 461.

² "The Bankruptcy Act, 11 U.S.C.A. §1 et seq., is to be liberally construed in favor of a bankrupt". *Dixon vs. Lowe* (C.C.A. 10) 177 F. (2d) 807, 808.

See, also, *Mueller vs. Elba Oil Co.*, 21 C. (2d) 188, 197, 130 P. (2d) 961, 966.

II.

Seemingly, the most effective way to deal with the homestead-exemption question involved herein is to go back to basic law and from that starting point to follow through to what appears ultimately to be the only soundly law-fortified determination that should be arrived at in this bankruptcy proceeding.

The present federal statutes, having to do, with the subject of bankruptcies, basically came into existence in 1898 and, since 1898, although amended in certain particulars, not pertinent to a decision herein, so have remained, and now are, parts of the law of the land, as the result of the extraordinary power vested in Congress by Article 1, Section 8, of the Constitution of the United States, which said last mentioned article and section, in part, reads:

"The Congress shall have Power * * * to establish
* * * Uniform Laws * * * on the subject of Bank-
ruptcies throughout the United States * * *" and
 " * * * that the power is both unlimited and supreme,
 is unquestioned," said the Supreme Court of the
 United States, in *Sturges vs. Crowninshield*, 17
 U.S. (Wheat. 4) *122, *192, 14 L.Ed. 529, 548.
 [Underlining above added for emphasis.]

See, also, *West Coast Life Ins. Co. vs. Merced Irr. Dist.* (C.C.A. 9, 114 F. (2d) 654, 673 (Cert. Den., *Pacific National Bank vs. Merced Irr. Dist.* 311 U.S. 718, 61 S.Ct. 441, 85 L.Ed. 467); In re

East Contra Costa Irr. Dist. (D.C.N.D. Calif.) 10 F.Supp. 175, 178.

Commenting, judicially, on Article 1, Section 8 of the Constitution—the aforesaid extraordinary power given unto Congress to establish uniform laws on the subject of bankruptcies—it is said, In re Chicago R. I. & P. Ry. Co. (C.C.A. 7) 72 F. (2d) 443, 452, “The grant of power ‘to establish * * * uniform laws on the subject of Bankruptcies’ (Const. art. 1, §8, sub. 4) was necessarily a grant of power, the exercise of which would impair the obligation of contracts. For legislation on the subject of bankruptcy contemplates a discharge of debtor’s debts—which is an impairment of contractual obligations.”

In Hanover National Bank vs. Moyses, 186 U.S. 181, 188, 22 S. Ct. 857, 860, 46 L.Ed. 1113, 1119, is laid down the rule, “The Subject of ‘bankruptcies’ includes the power to discharge the debtor from his contracts and liabilities, as well as to distribute his property. The grant to Congress involves the power to impair the obligation of contracts, and this the States were forbidden to do.”³

See, also, Louisville Bank vs. Radford, 295 U.S. 555, 589, 55 S.Ct. 854, 863, 79 L.Ed. 1593, 1604, 1605.

As pointed out by the Supreme Court of the United States, in Continental Bank vs. Rock Island

³ Article 1, Section 10, of the Constitution declares, in part, “No State shall * * * pass any * * * Law impairing the Obligation of Contracts.”

Ry., 294 U.S. 648, 680, 55 S.Ct. 595, 608, 79 L.Ed. 1110, 1130, in affirming, *In re Chicago R. I. & P. Ry.*, supra, declared, "Speaking generally, it may be said that Congress, while without power to impair the obligation of contracts by laws acting directly and independently to that end, undeniably, has authority to pass legislation pertinent to any powers conferred by the Constitution, however it may operate collaterally or incidentally to impair or destroy the obligation of private contracts."

When, in 1898, the Bankruptcy Act was enacted there was included, in such Act, Section 6 [11 USCA, §24] which then was made to read (and so it has continued to read, to date): "This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed⁴ by the laws of the

⁴ The Supreme Court of the United States has held that the words "prescribed" and "established" often are used to express the same thing and, according to Webster, are classed as synonymous. *Ex Parte Lothrop*, 118, U.S. 113, 119, 6 S.Ct. 984, 987, 30 L.Ed. 108, 110.

"'Established by Law' * * * means 'declared by legislative enactment'." *Dane vs. Smith* (S.Ct. Ala.) 54 Ala. *47, *49.

"That which is prescribed by law means that which is prescribed by an existing law and not by a law which has ceased to exist." *People vs. Voorhis*, (Ct. of A., N.Y. 119 N.E. 106, 108.

"The words 'prescribed by law' look to actual legislation upon the subject * * *" *Exline vs. Smith*, 5 Cal. 112, 113.

See, also, *Duran vs. Pickwick Stages System*, 140 C.A. 102, 108.

United States or the States laws in force⁵ at the time of the filing of the petition in the State wherein they have had their domicile for the six months preceding the filing of the petition, or for a longer portion of such six months than in any other State * * *

Since 1879, the Constitution of the State of California has contained Article XVII, Section 1, which reads, "The legislature shall protect, by law, from forced sale a certain portion of the homestead and other property of all heads of families."

In *Tyrrell vs. Baldwin*, 78 Cal. 470, 473, 474, 21 P. 116, 117, the Supreme Court of California said, "The right of homestead and exemptions is not beyond legislative control,⁶ but is the creature of the legislature, and can be limited according to the legislative will in any respect and at any time; and the law in force at the time of the death we think controls on the subject of homesteads and the right of survivors."

⁵ The meaning of the words "in force" is explained thus in *Bouviere's Law Dict.* (Rawle's 3rd Ed.), Vol. 1, page 1254: "A law may be said to be in force when it is not repealed, or more loosely, when it can be carried into practical effect * * *"

In the same law dictionary volume, same pages, the word "force" is defined as "Restraining power; validity; binding effect".

⁶ It will be observed that, by this language, the California Supreme Court directs attention to the fact the California Constitution does not so limit the California Legislature as to make it impossible for that body to change the homestead laws for better or worse, at any time.

Acting under the aforesaid California constitutional authority thus, and thereby, given, the Legislature of California, by an amendment of Section 1260 of the Civil Code, in 1953, increased the maximum homestead-exemption valuation allowable to a head of a family,⁷ from \$7,500.00 to \$12,500.00 said section, as amended, having been made to read, as it read at the time of the filing of the initial petition in bankruptcy herein:

“Homesteads may be selected and claimed: 1. By any head of a family, of not exceeding twelve thousand and five hundred dollars (\$12,500) in actual cash value, over and above all liens and encumbrances on the property at the time of any levy of execution thereon.

.....”

“The right to a homestead exemption is a privilege given by statute,” said the Circuit Court of Appeals for the Ninth Circuit in *Coopman vs. Citizens Bank of Omak*, (C.C.A. 9) 83 F. (2d) 815, 816.

But, by what statute, or statutes, it pertinently and appropriately may be asked? In the herein bankruptcy-proceeding there appears to be only one answer: Under the California Statute, supplemented by Section 6 of the Bankruptcy Act, [11 USCA, §24] i.e., under Section 1260 of the Civil Code of California (thus supplemented) as the last mentioned California Code section read on April 12, 1954, the date upon which the initial petition for a bankruptcy adjudication was filed in the above

⁷ The bankrupt herein is the head of a family.

entitled bankruptcy-proceeding, and not as Section 1260 of the California Civil Code as it read prior to said amendment.

On July 13, 1948, this bankruptcy court, *In re Herbert J. Klumpe, Bankrupt*, No. 36898,⁸ relying on the plain language of Section 6 of the Bankruptcy Act [11 USCA, §24] and the likewise plain language of Section 1260 of the California Civil Code, held that the homestead therein claimed should be (as it was) set apart to the bankrupt to the extent of \$7,500.00, in valuation, in accordance with Section 1260 of the California Civil Code, as that section read at the time of the filing of the initial bankruptcy petition therein and as it read on July 13, 1948, although, at the time the greater part of the debts of that bankrupt was contracted by him, Section 1260 of the California Civil Code fixed the maximum allowable homestead value at \$6,000.00.

But, it seriously is contended by counsel, on behalf of the trustee in bankruptcy herein, that, regardless of whether or not, such ruling, in the Klumpe case, was correct on July 13, 1948, under the law as it then had been made manifest, such is not the recognized California law, at this time, nor has it been the law, in California, since August 20, 1948, upon which said last mentioned date it was held, *In re Rauer's Collection Co., Inc.*, 87 C.A. (2d) 248,

⁸ See opinion therein, on file in the office of the Clerk of the United States District Court for the Northern District of California, Southern Division.

196 P. (2d) 803, that the homestead-exemption is limited, in valuation, to the maximum amount allowable, under California legislative enactment, at the time a debtor contracted with a certain creditor, or certain creditors, involved in said state court proceeding. However, inasmuch as the record In re Rauer's Collection Co., Inc., supra, clearly shows that no bankruptcy proceeding, under the Bankruptcy Act, and that no question involving such Act, or any section thereof, was under consideration in the last mentioned California state-court proceeding, the decision arrived at therein presumably sound for the purpose intended, in the cause in which it was rendered) can be of no binding effect or force, so far as the herein bankrupt, or this bankruptcy proceeding is concerned,⁹ inasmuch as that decision did not deal, or purport to deal, with a factual situation of the character now confronting this bankruptcy court in the above entitled bankruptcy proceeding, i.e., a situation wherein the exemption rights (homestead and otherwise) of a bankrupt, in a bankruptcy proceeding in a federal court, and under the beneficent provisions of the Bankruptcy Act, and particularly Section 6 [11 USCA, §24] thereof, are under consideration.

As is said in *People vs. Malowitz*, 133 Cal. App.

⁹This bankruptcy court is well aware of the holding, to the contrary, In re Zarmond Goodman, Bankrupt, in the United States District Court, Southern District of California, Central Division, but sees nothing therein set forth to change the views hereinbefore and hereinafter stated.

250, 255, 256, 24 P. (2d) 117, 179 “* * * by no judicial statement, however accurate and justly applicable to the case under consideration, may later cases, perhaps dependent upon altered facts or conditions, be conclusively defined, limited or determined. In other words, no general rule announced in connection with the particular facts of a given case can furnish a safe and infallible guide for the administration of justice in any other case in which the facts, conditions, or circumstances may materially differ from those present in the case in which the rule has been declared.”

See also, *Sharon vs. Sharon*, 75 Cal. 1, 26, 16 P. 345, 356, wherein it is said, “The language of a court must always be read in view of the facts before it.”

To the same effect is *Wright vs. Nagle*, 101 U.S. (XI Otto) 791, 796, 797, 25 L.Ed. 921, 923, which reads, “The language of the court in the opinion is to be construed with reference to the question actually under consideration, and should not be extended beyond for any purpose of authority in another and different case.”

Such must be the viewpoint of this bankruptcy court, despite the fact that the decision *In re Rauer's Collection Co., Inc.*, supra, is fortified (for the purpose of that state-court proceeding) by such often-cited decisions as *Gunn vs. Barry*, 82 U.S. (XV Fall.) 610, 21 L.Ed. 212, a case that was brought up from the state-court of Georgia and dealt with the application to the facts and circumstances of that state-court proceeding (wherein no

federal bankruptcy proceeding was involved) of Section 10, Article 1, "No State shall pass any law impairing the obligation of Contracts;" in which said last-mentioned state-court proceeding no federal bankruptcy proceeding was involved; *Edwards vs. Kearney*, 96 U.S. (VI OTTO) 595, 24 L.Ed. 793, a case that arose out of a state-court proceedings originating in North Carolina, and also involving the application of Section 10, Article I, of Constitution, to a record in which no federal bankruptcy proceeding question was presented; *Bank of Minden vs. Clement*, 256 U.S. 126, 41 S.Ct. 408, 65 L.Ed. 857, a case growing out of a Louisiana state-court proceeding involving the application of Section 10, Article I, of the Constitution to the record therein, in which, also, there was no federal bankruptcy proceeding question under consideration, at any time therein, and *W. B. Worthern Co. vs. Thomas*, 292, U.S. 426, 54 S.Ct. 816, 78 L.Ed. 1344, which likewise did not involve any federal bankruptcy proceeding, but did involve the application of Article 1, Section 10, of the Constitution to the facts and circumstances shown by the record in the Arkansas state-court proceeding then under consideration by the Supreme Court of the United States.

For this bankruptcy court to hold herein that it is bound by the *Rauer* case ruling—which, in effect, declares that if there be an existing creditor of a debtor who became such prior to the amendment by the California Legislature of Section 1260 of the California Civil Code increasing the maximum

homestead valuation allowable to a debtor, a homestead to the greatest extent possible, under the amendment, cannot be allowed to such debtor (so far, at least, as the aforesaid prior creditor is concerned)—would place this bankruptcy court in a position where, under Section 6 of the Bankruptcy Act [11 USCA, §24], it could not allow any homestead to the herein bankrupt of any value whatever, inasmuch as the only way a bankruptcy court can allow to a bankrupt any exemption (homestead or otherwise) is by virtue of Section 6 of the Bankruptcy Act [11 USCA, §24] which plainly declares that the Bankruptcy Act “shall not affect the allowance to bankrupts of the exemptions which are prescribed¹⁰ by the laws of the United States or by State laws in force¹¹ at the time of the filing of the petition * * *” Under the circumstances, it inexorably follows that when the California Legislature, by its amendment of 1953, struck from Section 1260 of the California Civil Code the figures “\$7,500.” and replaced said last mentioned figures by the figures “\$12,500.” it, in effect, repealed that portion of the last mentioned section to the extent that the figures “\$7,500” were stricken and thus no longer can be considered as a part of the statute. Consequently, this bankruptcy court (if the Rauer case ruling is to be followed) would have no maximum valuation figures to be used to limit the herein bankrupt’s homestead allowance and hence there

¹⁰ Established by legislative action.

¹¹ Not repealed.

would be no "prescribed" law "in force", at the time of the filing of the petition in the above entitled bankruptcy proceeding to which this bankruptcy court could look to ascertain the maximum homestead valuation that could be allowed to the bankrupt.

It is inconceivable that any such incongruous result could have been intended by Congress when it enacted the Bankruptcy Act under the sweeping power granted it in the Constitution, and, specifically, included in such Act the carefully chosen language of Section 6 of such Act.

It is of primary importance herein to bear in mind that, as is said in *Bank of Nez Perce vs. Pindel* (C.C.A. 9) 193 F. 917, 921, "* * * the bankruptcy courts are invested with jurisdiction—such jurisdiction in law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, and among other things to 'determine all claims of bankrupts to their exemptions.' Clause 11, §2, Bk. Act."

Although this bankruptcy court if, and when, it orders set apart, to the bankrupt, any homestead-exemption, is bound to follow California law, the binding force of that rule in its application, in this bankruptcy proceeding, is that this bankruptcy court so is bound in but two particulars:

(a) To use the California law only as a yardstick for the purpose of ascertaining and determining whether, or not, the bankrupt, or any authorized person in his behalf, has pursued the required legal procedure, before bankruptcy, to select the home-

stead and to give notice to the world of such selection in order to insure to the bankrupt the basic legal right to ask the bankruptcy court in which the initial bankruptcy petition has been filed, to set apart the sought-for homestead-exemption, in that particular bankruptcy proceeding, and

(b) To use such California law only for the purpose of ascertaining and determining the maximum extent, in valuation, of such homestead-exemption, in the bankruptcy proceeding, and not in some other and, perhaps, more limited forum. In other words, "That a bankrupt's right to exemptions must be deduced from the state law is unquestionable, but it is no less true that, where the right exists, it is to be asserted in the manner which the bankruptcy act itself prescribes." *Lipman vs. Stein*, (C.C.A. 3) 134 F. 235, i.e., giving to Section 6 of the Bankruptcy Act [11 USCA, §24] the most effective interpretation, favorable to the bankrupt, made possible by the unambiguous language used by Congress when, under express constitutional grant, it included this forward-looking section in such Act.

In *Palais vs. DeJarnette* (C.C.A. 4) 145 F. (2d) 953, 955, it is said, "The controlling rule was stated with crystal clearness in *White vs. Stump*, 1924, 266 U.S. 310, 312, 45 S.Ct. 103, 69 L.Ed. 301; 'The Bankruptcy Law does not directly grant or define any exemption, but directs, in section 6 * * * that the bankrupt be allowed the exemptions "prescribed by the state law in force at the time of the filing of the petition"' in other words, it makes the state

laws existing when the petition is filed the measure of the rights of exemption." [Underlining added herein for emphasis.]

Some light is shed upon the procedure that should be followed herein by the holding *In re Richards* (D.C. Tex.) 64 F. Supp. 923, wherein an exemption question (not as regards a homestead, however, but nevertheless applying Section 6 of the Bankruptcy Act [11 USCA, §24] to the facts therein present) was before the court. The opinion therein, at page 924, states "* * * citing *Lyon vs. Matthews Co. vs. Praetorian*, Tex. Civ. App., 142 S.W. 29, *Edwards vs. Kearzey*, 96 U.S. 595, 24 L.Ed. 793, *The Queen*, D.C., 93 F. 834, 835, and other similar cases, the Trustee and creditors take the position that since the bankrupt's debt to Creditor Jones was contracted before bankrupt acquired the ring, and before the passage of the Act of 1935, the question of exemption of the ring must be decided in accordance with the law as it was at the time the debt was contracted and/or bankrupt acquired the ring. That position, however, is not meritorious. The Bankrupt Act provides that exemptions shall be allowed and must be set aside in accordance with the laws in force at the time of the filing of the petition in bankruptcy. [Underlining added for emphasis.]

There is no denying that, at least, so far as exemptions (homestead and otherwise) are concerned, an insolvent debtor who voluntarily has placed himself, or so has been placed involuntarily, behind the protecting shield afforded by the beneficent pro-

visions of the Bankruptcy Act is in a vastly more advantageous position, with regard to exemptions, (homestead and otherwise) than is a debtor (insolvent or otherwise) attempting to claim the same sorts of exemptions under any state law, unaided by the Bankruptcy Act, and this is so because the former is legally unvexed by the provisions of the Constitution of the United States prohibiting states from impairing the obligation of contracts, inasmuch as the very instant the initial petition, under the Bankruptcy Act, is filed in a federal court having jurisdiction of the bankruptcy proceeding, the obligation of the contracts involved become, and, henceforth, is impaired. Moreover, it successfully cannot be said that, although the mere filing of a bankruptcy proceeding has caused a certain degree of impairment of the contracts involved, the bankrupt, so filing cannot take further advantage by the use of any provision of law which, additionally might, could or would, impair the obligation of the originally-affected contracts, for the reason, as hereinbefore noted, not only does the Bankruptcy Act, under the Constitution of the United States, justify the impairment of the obligation of contracts, but such Act goes still further in its effect, because, by the exercise of the sweeping provisions of said Act, the obligation of contracts involved ultimately may "destroy" such obligation. *Continental Bank vs. Rock Island Ry.*, *supra*.

There is another phase of the homestead-exemption question involved herein which must be given consideration, i.e., whether, or not, in the light of

the fact that Section 6 of the Bankruptcy Act [11 USCA, §24] ever since 1898, has been a part of the law of the land, it legally, and in truth, can be said that the obligation of the contract of any creditor of the herein bankrupt suffered any impairment, or destruction, which would be brought about merely and solely, by this bankruptcy court holding that the bankrupt herein is entitled to have a homestead-exemption to the extent, in valuation, of \$12,500.00, as provided by the 1953 amendment of Section 1260 of the California Civil Code.

In dealing with this phase of the homestead-exemption question, it is to be remembered that as is said in *Northern Pacific Railway Co. vs. Wall*, 241 U.S. 87, 91, 36 S.Ct. 493, 495, 60 L.Ed. 905, 907, “* * * the laws in force at the time and place of the making of a contract, and which affect its validity, performance and enforcement, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.”

See, also, *Von Hoffman vs. City of Quincy*, 71 U.S. (IV Wall.) 535, 550, 18 L.Ed. 403, 408, and to the same effect, *Wood vs. Lovett*, 313 U.S. 362, 370, 61 S.Ct. 983, 987, 85 L.Ed. 1404, 1407.

As is the rule, in the above mentioned regard, followed in federal courts, so is said rule followed in the courts of the State of California, it thus being stated in *Albertoni vs. Albertoni*, 104 C.A. 633, 634, 286 P. 473, 474, “All applicable laws in existence when an agreement is made necessarily enter into it and form a part of it as fully as if they

were expressly referred to and incorporated in its terms.”

In declaring that “the laws in force at the time and place of the making of a contract, and which affect the validity, performance and enforcement, enter into and form a part of it, as if they were expressly referred to, or incorporated in its terms,” the Supreme Court of the United States, in the above last-cited federal cases, not only had reference to the laws set forth in the statute books of a particular state (as, in the present instance, the laws of the State of California), but also had reference to state laws, as supplemented, both in fact and intent, by any federal statute, including, of course, the Bankruptcy Act. “It is entirely true”, declared the Supreme Court of the United States, in *Conner vs. Long*, 104 U.S. (XIV OTTO) 228, 239, 240, 26 L.Ed. 723, 727, “that the act of Congress prescribing a uniform rule as to bankruptcies, in pursuance of an express grant of power in the Constitution of the United States, is the paramount law throughout the territorial jurisdiction of the national government. It is as truly the law of each State, as it is, and because it is, a law of the United States,” and, as is said by the Circuit Court of Appeals for the Ninth Circuit, in *The Penza*, 9 F. (2d) 527, 528, “It is always assumed that statutes are passed in the light of, and with reference to pre-existing law * * *”

Inasmuch as the rule has been long-established by the highest court of the United States that “the laws in force at the time and place of the making of a

contract, and which affect its validity, performance and enforcement, enter into and form a part of it, as if they were expressly referred to, or incorporated in its terms," the bankrupt herein, now being before this bankruptcy court legally is entitled to a holding, in effect, that each contract which the bankrupt entered in to with any one of his creditors, regardless of the date up which such contract was entered into, must be read as if language, not unlike the following specifically were set forth therein:

In entering into this contract the parties hereto understand, as a matter of law, known to each of them, that, in the event that any of such parties shall become a bankrupt, in a bankruptcy proceeding filed under the Bankruptcy Act, in a United States District Court, the bankruptcy court in which such bankruptcy proceeding is pending constitutionally is empowered to, and legally can, may, and should, exercise that power, under, in accordance with, and pursuant to, Section 6 of the Bankruptcy Act [11 USCA, §24], to set apart to such bankrupt such bankrupt-claimed exemptions (homestead and otherwise) as have been enacted into law by State legislation which said state-legislation has not been repealed and which can be carried into effect under the broad provisions of such last-mentioned section of said Act, and such bankruptcy court constitutionally can, and legally may, so proceed, even though the state-exemption laws (homestead and otherwise), by virtue of which the bankruptcy court shall set apart, as exempt, property to the bankrupt, shall have been enacted into law,

by the state legislature, subsequent to the date of this contract.

In the *Legal Tender Cases*, 79 U.S. (XII Wall.) 457, 551, 20 L.Ed. 287, 312, it is declared that “* * * contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority.”

See, also, *Norman vs. B. & O. R. Co.*, 294 U.S. 240, 305, 55 S.Ct., 407, 415, 79 L.Ed. 885, 901.

It conclusively is shown in the *Legal Tender Cases*, *supra*, at page 549, 550, 79 U.S., page 311, 20 L.Ed., how far-reaching, within constitutional limits, are statutory enactments of Congress when those enactments are brought into existence as the result of special grants of power by the Constitution of the United States. Particularly is the attitude of the Supreme Court in regard to the broad powers of Congress, backed by constitutional grants, positively made manifest by the following plain language, “Nor can it be truly asserted that Congress may not, by its action, indirectly impair the obligation of contracts, if by the expression be meant rendering contracts fruitless, or partially fruitless. Directly it may, confessedly, by passing a bankrupt act, embracing past as well as future transactions. This is obliterating contracts entirely.” Hence, if there be no contract, there is no obligation to impair!

As, plainly and to the point, stated In *re Missouri Pac. R. Co.* (D.C., Mo.) 7 F.Supp. 1, 7 (af-

firmed in *Norman vs. B. & O. R. Co.*, 294 U.S. 240, 55 S.Ct., 407, 79 L.Ed. 885), "It has long been necessary, in order at all to enforce the law, to indulge the conclusive presumption that every citizen knows the law. Actually, of course, the presumption is a fiction, but it is so necessary a fiction that it is settled."

See, also, *Boehm vs. Spreckles*, 183 Cal. 239, 248, 191 Pac. 5, 9.

Clearly, under the extensive power constitutionally granted unto Congress, to deal with the subject of bankruptcies, Congress could, as it did, give to bankrupts, under the Bankruptcy Act, greater rights than are had by debtors, not under the Bankruptcy Act, because "* * * contracts, good when made, may become bad and incapable of enforcement, by reason of the passage by Congress, acting within its constitutional limits, of subsequent prohibitions against the enforcement of such contracts." In *re Missouri R. Co.*, *supra*, page 6.

It, also, is to be remembered that not only are private parties to contracts bound by the conclusive presumption that every citizen is presumed to know the law, In *re Missouri Pac. R. Co.*, *supra*, but that it also legally is true that members of legislative bodies are bound by the same rule. So, when the California Legislature (acting within the limitations placed upon it by the Constitution of the United States, and, particularly, having before it, as its members conclusively are presumed to have had, the forward-looking language of Section 6 of the Bankruptcy Act [11 USCA, §24] and also acting

with the knowledge that "The Congress may adopt state legislation, and thus give it the sanction¹² of its own legislative power," *United States vs. O'Toole* [D.C., W. Va.] 236 F. 993, 996, [Affirmed in *U.S. vs. Gradwell*, 243, U.S. 476, 37 S.Ct. 407, 61 L.Ed. 857]) unhampered—so far as the herein bankrupt and this bankruptcy proceeding are concerned—by the provisions of the Constitution of the United States forbidding states to pass laws impairing the obligations of contracts—increased, in valuation, the allowable homestead, it unquestionably left Section 1260 of the California Civil Code in a position where, in this bankruptcy proceeding, this bankruptcy court, legally could give effect to such section as if there had been added to the wording of such last mentioned section, language not unlike the following:

In the event that, between a homestead claimant and any other person, or a corporation, there be an existing contract which was entered into prior to the effective date of the above amendment whereby the generally allowable homestead, in valuation, is increased, such homestead claimant, unless he be a person claiming a homestead, to the extent of the increased valuation, in a bankruptcy proceeding in which he is a bankrupt, shall be entitled, if otherwise qualified, to a homestead only to the extent, in

¹² It appears from the context in which it is used above that the word "sanction" so is employed as to "convey the idea of sacredness, or of authority." *People vs. Kraft* (Ct. of Appeals, N.Y.) 43 N.E. 80, 81.

valuation, that, generally, was allowable immediately prior to the time when this section was amended to read as it now stands.

Upon the record presented herein and what appears to be the pertinent law so far as this bankruptcy proceeding and the rights of the bankrupt herein, aided specifically by the Bankruptcy Act, are concerned, this bankruptcy court, remembering that, as is said in *Quong Wing vs. Kirkendall*, 223 U.S. 59, 64, 32 S.Ct. 192, 193, 56 L.Ed. 350, 352, "Laws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way", seemingly is justified, beyond dispute, in holding that Congress meant exactly what it said, no more and no less, when it incorporated into the Bankruptcy Act and, over the years, has continued to keep therein, the positive language, "This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by State laws in force at the time of the filing of the petition * * *"

In other words, this bankruptcy court, instead of following the rule laid down in a state-court proceeding wherein no bankrupt, under the federal Bankruptcy Act, or no such bankruptcy proceeding, was involved, feels impelled to, and, believes, from a legal standpoint that it must, be guided by the rule, in dealing with the provisions of the Bankruptcy Act, that "* * * every word is presumed to have meaning and purpose for Congress is not to

be thought by the courts to use language idly," *Adler vs. Northern Hotel Co.* (C.C.A. 7) 175 F. (2d) 619, 621. To do otherwise than to follow the last mentioned rule herein, seemingly would be for this bankruptcy court to blindly ignore the pointed admonition of the Supreme Court of the United States in *United States vs. Brown*, 206 U.S. 240, 244, 27 S.Ct., 620, 621, 51 L.Ed. 1046, 1047, i.e., "* * * whatever the consequences we must accept the plain meaning of plain words," for, as is said in *Thompson vs. United States*, 246 U.S. 547, 551, 38 S.Ct. 349, 351, 62 L.Ed. 876, 879, "The intention of Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture."

Therefore, in the light of all the facts heretofore found in the above entitled bankruptcy proceeding, the circumstances shown by the record in such bankruptcy proceeding and the existing, well-settled law applicable thereto, this bankruptcy court concludes as follows:

1. That there should be set apart to the bankrupt herein, as exempt, not only all those items of personal property hereinbefore set apart to the bankrupt, as exempt, in "Trustee's Report of Exempt Property," but, also, under the provisions of Section 690.4 of the California Code of Civil Procedure, supplemented by Section 6 of the Bankruptcy Act [11 USCA, §24], there likewise should be set

apart to the bankrupt, as exempt, all the other items of personal property heretofore claimed exempt by the bankrupt, and

2. That there also should be set apart to the bankrupt, as exempt, under the provisions of Section 1260 of the California Civil Code (as such section was amended by the California Legislature, in 1953), supplemented by Section 6 of the Bankruptcy Act [11 USCA, §24], the homestead claimed by the bankrupt, not exceeding \$12,500.00 in actual cash value.

Let It Be Ordered, Adjudged and Decreed Accordingly.

Dated: February 10, 1955.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy

[Endorsed]: Filed February 10, 1955.

[Title of District Court and Cause.]

CERTIFICATE AND REPORT OF REFEREE
RELATIVE TO PETITION FOR REVIEW
OF ORDER OF REFEREE FILED IN THE
ABOVE ENTITLED MATTER Feb. 10, 1955

To Honorable Edward P. Murphy, United States
District Judge for the Northern District of
California:

I, Burton J. Wyman, one of the referees in bankruptcy of the above entitled court, and the referee

in charge of the above entitled proceeding, respectfully certify and report as follows:

On April 12, 1954, Daniel E. Sanderson filed his voluntary petition in bankruptcy in the above entitled court.

On April 13, 1954, Daniel E. Sanderson was adjudged a bankrupt.

On August 4, 1954, "Bankrupt's Objection to Trustee's Report of Exempt Property" and "Trustee's Report of Exempt Property" (both of which theretofore had been filed in the above entitled bankruptcy proceeding and both of which herewith are handed up as parts of this certificate and report) came on for hearing before the undersigned referee in bankruptcy, at which time Pierce N. Stein, Esq., representing Jefferson E. Peyser, Esq., the attorney for the bankrupt, and Daniel Aronson, Jr., Esq., representing Messrs. Shapro & Rothschild, the attorneys for the trustee in bankruptcy herein, appeared and the following occurred:

"Daniel E. Sanderson

"Called as a witness for Objecting Bankrupt, sworn.

"Mr. Stein: Your Honor, in this matter the trustee has filed a report on the exemptions and on behalf of the Bankrupt, we filed objections to that report in certain particulars. The report recognizes and reports favorably on certain exemption claims in the schedules, but omits a favorable report as to certain property, consisting of tools, implements, and so forth, which we consider necessary to the conduct of the Bankrupt's business.

"The Referee: Were they claimed in the schedules?

"Mr. Stein: And claimed in the schedules, and that is the basis of one objection.

"The other objection goes to the amount of the homestead exemption set forth in the report in the amount of \$7,500.00, claimed in the schedule in the amount of \$12,500.00.

"This latter may be moot. I will go over that when I cover the first subject of objection.

"Q. Now, Mr. Sanderson, what is your present occupation?

"A. Building contractor.

"Q. Was that your occupation—is that building contractor? "A. Building contractor.

"Q. Was that your occupation at the time you filed the Petition in Bankruptcy?

"A. That is right, sir.

"Q. How long prior to the filing of the Petition in Bankruptcy did you carry on that business?

"A. About nine years.

"Q. Constantly? "A. Constantly.

"Q. Now, in your Schedule B-5 of your Petition, you claimed as exempt tools and implements under the provisions of Sec. 690.4 of the California Code of Civil Procedure, did you not?

"A. What did you say?

"Q. You claim exempt certain tools and implements? "A. That is right.

"Q. And those tools which you claimed as exempt consisted of the following, did they not? I am going to read them off to you. They are specified

in your objections to the Trustee's report on file herein, including 1-14 inch band saw?

"A. Yes.

"Q. One 8 inch table saw? "A. Yes.

"Q. One 6 inch planer; one 11½ h.p. Duplex cut-off saw? "A. That is right.

"Q. Two Skill saws? "A. That is right.

"Q. 6 picks? "A. That is right.

"Q. 6 shovels? "A. That is right.

"Q. 3 wrecking bars, one sledge hammer and miscellaneous hand tools, consisting of hammer, saw, hand plane, screw drivers, drills, bit, etc., and other carpenter's tools?

"A. That is correct, sir.

"Q. Are all those tools and implements I just specified to you needed and used by you in carrying on your business as a building contractor?

"A. They are, sir.

"Q. In the conduct of your business as a building contractor, are there certain phases of the construction work which you do not let out to sub-contractors?

"A. Yes, there are certain phases I do not let out to subcontractors.

"Q. What work do you ordinarily not let out to sub-contractors?

"A. The carpenter labor and common laborers.

"Q. And the carpenter work and laborers' work as such, is that work performed under your direction and supervision?

"A. Direct direction and supervision.

"Q. Now, are the tools and implements which

I have specified, used in the conduct of that laboring and carpentry work?

"A. They are, sir.

"Q. Do you employ other persons to do the labor work and the carpenter work?

"A. I employ persons to do labor and carpenter work and wrecking.

"Q. Do they ordinarily furnish the tools and implements I have specified, or does the contractor?

"A. The contractor; also the machine tools you mentioned and some hand tools. Each carpenter has a kit of tools, but no power tools or any type of bar or sledge hammers do they furnish.

"Q. For example, do carpenters furnish such items as a band saw? "A. They do not.

"Q. Table saw? "A. No, sir.

"Q. Cut-off saw? "A. No, sir.

"Q. Skill saws? "A. No, sir.

"Q. Do laborers furnish such items as picks, shovels, wrecking bars? "A. No, sir.

"Q. Or the sledge hammers?

"A. No, sir.

"Q. Are those implements customarily furnished by the building contractor to the people who work for him and perform that work?

"A. They are, sir.

"Q. In carrying on your contracting business, have you furnished the tools mentioned to the men working on your jobs? "A. I have.

"Q. Are you so doing now?

"A. Doing so at the present date.

"Q. Have you yourself, personally, used any of

these tools and implements in connection with construction work?

“A. I have used all mentioned.

“The Referee: Q. Do you use them regularly?

“A. I do, sir, at various times.

“Mr. Stein: Q. Could you profitably carry on your business as a building contractor without the use of the tools and implements we have discussed?

“A. I would be very hampered in doing without them.

“Q. Do you consider you need them?

“A. I do.

“Q. Are they reasonably necessary in carrying on your business?

“A. They are; specifically so.

“Mr. Stein: In addition to the tools and implements, Your Honor, just mentioned, certain office equipment and furnishings likewise are claimed exempt and I can either go on questioning at this time about them or interrupt the examination for examination by Mr. Aronson.

“The Referee: Let's finish with your direct and then let him cross examine.

“Mr. Stein: Q. Mr. Sanderson, you also object to the Trustee's report in not exempting a typewriter, adding machine, check protector and recording calculator?

“A. That is right, sir.

“Q. Now, do you use those items of office equipment in the conduct of your business?

“A. Daily.

“Q. In your business of building contractor?

"A. I do, sir.

"Q. For what purpose are they used?

"A. Billing, getting out contracts, adding up figures, adding up estimates, calculating estimates, appraisals, billings, things of that nature.

"The Referee: Q. Do you use them yourself?

"A. I do, sir, except the typewriter. The wife uses the typewriter in making up bills and correspondence. I don't use the typewriter; I cannot. All the other equipment, I use. The check machine, calculator, adding machine I use personally. I am doing my own estimating now. I hire an estimator to come in occasionally when I have a large job so that I need assistance.

Mr. Stein: Q. Now, you also claimed exempt in Schedule B-5 desks, chairs, typewriter and other office equipment used for making your living. The Trustee, in his report, has granted as exempt chairs, tables, desks and books of the estimated value of \$200.00. Do you have as office furniture—excuse me. Let me put it this way:

"The Trustee has furnished me with a copy of an inventory of office equipment and furniture, which includes among other items the following:

"1 steel pedestal typewriter desk

1 steel table

4 leather upholstered chairs

2 file cabinets

1 light maple desk.

"Excuse me. The items prior to the maple desk he has listed as being in the front room at 940 Potrero Avenue, San Francisco. He also lists as

being in the room designated as 'Mr. Sanderson's room':

- "1 light maple desk
- 1 swivel chair
- 2 upholstered arm chairs
- 1 desk lamp
- 1 cigarette stand.

And the list further specifies as being in the room designed *a* the 'Blue Print Room' in the same premises:

- "1 steel desk
- 1 small chair
- 2 upholstered chairs
- 1 costumer
- 1 cigarette stand
- 1 drafting table with 12 drawers
- 1 drafting table stool
- 1 electric lamp
- 1 steel letter file.

"Now, did you use all those items of office furniture in the conduct of your business as a building contractor immediately prior to the time you filed the Petition in Bankruptcy?

"A. Did I use them?

"Q. Yes. "A. Yes.

"Q. Now, do you consider that you needed——

"A. I do consider.

"Q. All those items of furniture in the conduct of your business? "A. I do, sir.

"Q. How do you consider all those items of office furniture necessary in the conduct of your business?

"A. Well, I use them daily or every other day. For instance in my office: In my office, I consult them in my office directly. Then, when I am estimating by myself in the small room adjacent to my office where I have my blue print room, I have blue prints stored; the desk and calculating machine and adding machine are in that particular room. It is a private room and a telephone and desk are in there.

"Q. Let me interrupt. Let's take each room and the furniture therein.

"Mr. Aronson: Let me interrupt. It might shorten this case. The Trustee will stipulate that all items on the list are used by Mr. Sanderson in his business as a general contractor.

"Mr. Stein: Will you stipulate they are necessary?

"Mr. Aronson: I will stipulate they are used.

"Mr. Stein: I want to establish necessity, so I can bring it within the exemption statute. Will you stipulate they may be exempt to him? That is the purpose of the inquiry.

"Mr. Aronson: That they are exempt?

"Mr. Stein: Should be exempt.

"Mr. Aronson: That is not the Trustee's report.

"Mr. Stein: Q. Let's take the Blue Print Room, Mr. Sanderson. There is a steel desk, a small chair, two upholstered chairs among other items listed there. Do you consider those items necessary in the conduct of your business? "A. I do, sir.

"Q. Why?

"A. Because they are part of my private office.

I can go in and close the door if I need to and consult on these jobs.

“Q. Speaking of the Blue Print Room?

“A. Speaking of the Blue Print Room. The estimating room, I would term it; away from everybody and noise. I need to do it that way.

“Q. Who would make use of the desk and chair in that room?

“A. I would make use of the desk and chair in that room.

“Q. Does anybody else use them?

“A. Yes, occasionally I would have an estimator come in, when a job is large. He would use the facilities I use in this same room.

“Q. About the drafting table and drafting stool?

“A. They would be used constantly in estimating.

“The Referee: Q. By whom?

“A. By myself.

“Mr. Stein: Q. The electric lamp and letter file would be used, necessary for use?

“A. The letter file is for filing contracts and correspondence of daily and job records.

“Q. Now, there is another break down here, furniture in Mr. Sanderson's room. That room lists: Desk, arm chair, swivel chair, two arm chairs, desk lamp and cigarette stand. Now, in what way is this furniture needed by you in the conduct of your business?

“A. To consult clients, take them in my office and figure their jobs.

“Q. Now in the front room are items listed,

including the typewriter desk, steel table, four leather upholstered chairs, 2 file cabinets. Where are those items needed in the conduct of your business?

“A. I have a girl there most of the time. She has a phone and takes down orders. My wife comes in evenings and does typing for me, uses the typewriter there and the phone and desk at that particular place.

“Mr. Stein: I have no further questions, Your Honor.

“The Referee: Cross examine?

“Mr. Aronson: I have no questions.

“The Referee: No questions?

“Mr. Aronson: No.

“Mr. Stein: I would like to point out, Your Honor, that the \$200.00 statutory exemption under Sec. 690.1 has been passed on favorably by the Trustee, but the items of furniture we have discussed include all items of furniture therein and, apparently, would exceed in value the \$200.00 exemption included under that section, and we take the position that those items of furniture are exempt under Sec. 690.4 as being necessary to the conduct of his business. Therefore, we ask that all items of furniture be exempt under both sections, rather than just \$200.00 under Section 690.1. I believe the authorities will support that position.

“The Referee: You said something about the homestead matter being moot.

“Mr. Stein: The homestead point is this, Your Honor——

“The Referee: Didn’t you say it was moot?

“Mr. Stein: I said it might be moot.

“The Referee: If it is moot, I don’t want to go into it.

“Mr. Stein: Here is the situation on the homestead; there may be a way of having it determined so we will know whether it is going to be moot or not: But, there is indebtedness in the sum of \$8,700.00 against the homestead property, represented by a mortgage indebtedness. If the homestead exemption were limited to \$7,500.00, the market value of the property might conceivably leave a balance available to the estate depending upon what the market valuation would be; on the other hand, it might not. In other words, the market valuation might be less than \$16,000.00, in which case it would be immaterial whether a \$7,500.00 or \$12,500.00 exemption were set apart here, because there would not be anything left for the estate in either event. Now, that matter becomes material only if there would be something left over and above the amount of indebtedness and \$7,500.00 exemption, in which event, the Bankrupt takes the position that the \$12,500.00 exemption should be granted to him. Now, with \$12,500.00 exemption granted, it is pretty clear there could not possibly be an equity over and above that. The property, apparently, is of a value of between \$13,000.00 and maybe up to \$20,000.00; we don’t know.

“It would be my suggestion, if it can be done, that the property be appraised first to determine whether or not there would be an equity above the

\$7,500.00 exemption. If there is not, the question would be moot.

"The Referee: Do you want to pay for the appraisal?

"Mr. Stein: Well, the Bankrupt is not in position to pay for the appraisal, no, sir. I am prepared to urge the point now as a matter of law.

"The Referee: What have you to say on the law point?

"Mr. Aronson: On the homestead, it is the Trustee's position, Your Honor, that the \$20,000.00 valuation is set forth in the schedule. Also, on behalf of the creditors, it would appear that the question of whether he is entitled to \$7,500.00 or \$12,500.00 is very material to the creditors.

"The Referee: In other words, you want it ruled on?

"Mr. Aronson: I would like a ruling on it.

"Mr. Stein: I am prepared to argue the matter.

"The Referee: I have already ruled on it when it was raised before. I don't think argument would change my ruling.

"Mr. Stein: I am not aware of the previous ruling. Of course, the facts here are that the Declaration was recorded in February of this year when the law was \$12,500.00 and the increase in the exemption was, by statute, effective September, 1953. In this particular estate, I am informed that the amount of creditors incurred prior to September, 1953 is very small.

"The Referee: I would not care if they were all incurred after that statute, under my ruling.

“Mr. Aronson: If I may interrupt: I don’t want to state your case or speak for the Court, but I think, in so far as we know, there has been only one case, Moore vs. Bay that has ever discussed the point involved as to the mortgage question.

“The Referee: I have that in mind too. Also, I have in mine the way the Bankruptcy Act reads.

“Mr. Aronson: That is the basis of the Trustee’s position.

“The Referee: It says the law that is in force at the time of the filing of the Petition in Bankruptcy.

“Mr. Stein: That is the \$12,500.00 exemption. That is the position we urge.

“The Referee: The only objection I have ever heard, and you cannot do it, is because it impairs the obligation of the contract. But, the filing of the bankruptcy itself did that, so, there cannot be any obligation that is being impaired, and the people, when they contracted with the bankrupt to give him credit, are presumed to know the law and the law has been in effect many many years so far as bankruptcy is concerned.

“Mr. Aronson: The people who extended credit prior to the time the statute was amended to raise the exemption and also as to the time the homestead was put on, extended credit on the basis that the maximum would be \$7,500.00.

“The Referee: No, they did not. They extended credit on the basis of the Bankruptcy law, knowing there was such a thing as the Bankruptcy law, and the Bankruptcy law says the law that is in force

and effect at the time of the filing of the Petition, and \$12,500.00 was in force and effect, and that is Sec. 6 of the Bankruptcy Act. It has been in there, I think, ever since 1898, and they are presumed to know the law. Do you want to brief it?

"Mr. Stein: Yes, sir.

"Mr. Aronson: Is this as to the whole?

"The Referee: As to the whole.

"Mr. Aronson: I would like to make known the Trustee's position in so far as the tools are concerned and any items on the Trustee's inventory, desks, typewriter, so on, *except* to the extent of \$200.00. It is the Trustee's contention that as a general contractor, Mr. Sanderson does not fall within the Artisan's provisions of Sec. 690.4; thus, he would be limited to the \$200.00 of chairs, books, and tables. As to the other items, including the hand tools as well as other items, for which, incidentally, the inventory the Trustee has made, which has not been filed, shows a value of \$1156.00 according to the inventory, it is our position, being a general contractor, which has been his testimony throughout the proceedings, he is not entitled to them.

"We also urge upon your Honor and call to your attention Raulers Collection Agency, 87 Cal. Ap. 248 on the question of the homestead."

The matter having been submitted, without the filing of any briefs on behalf of either of the interested parties, the undersigned referee in bankruptcy, on February 10, 1955, filed herein the summary of record and findings of fact, the document pertaining thereto reading as follows:

Papers Handed Up Herewith

The following papers are handed up herewith as parts of this Certificate and Report:

1. "Declaration of Homestead".
2. "Trustee's Report of Exempt Property".
3. "Bankrupt's Objection to Trustee's Report of Exempt Property".
4. Reporter's Transcript of Hearing on August 4, 1954.
5. "Petition for Review".

Dated: June 16th, 1955.

Respectfully submitted,

/s/ BURTON J. WYMAN,
Referee in Bankruptcy

[Endorsed]: Filed June 16, 1955.

[Title of District Court and Cause.]

PETITION FOR REVIEW

Comes now John O. England, Trustee of the above-named estate, and respectfully represents:

That heretofore and on the 19th day of February, 1955, Hon. Burton J. Wyman, Referee in Bankruptcy, herein made and entered herein that certain "Summary of Record and Findings of Fact Relative to Bankrupt's Exemptions, Homestead and Otherwise", a full and true copy of which is hereto annexed, marked Exhibit "A", specifically referred

to and made a part hereof; that certain "Opinion and Conclusions of Law Relative to Bankrupt's Exemptions Rights, Homestead and Otherwise," a full and true copy of which is hereto annexed marked Exhibit "B", specifically referred to and made a part hereof; and that certain "Order, Judgment and Decree Relative to Bankrupt's Claimed Exemptions (Homestead and Otherwise)", a full and true copy of which is hereto annexed marked Exhibit "C", specifically referred to and made a part hereof; that the aforesaid Referee's Order so made and entered herein on the said 10th day of February, 1955, was and is erroneous and contrary to law in each and all of the following particulars:

1. That neither said Referee's Order nor his said conclusions are supported by and, in fact, are contrary to the evidence adduced and to the records, papers and files herein.

2. That the conclusion of law made by said Referee and numbered 1 is contrary to law and not supported by valid findings of fact, and/or is not supported by the records, papers and files herein in that a building contractor is not a mechanic or artisan as set forth in Section 690.4 of the Code of Civil Procedure of the State of California.

3. That of said conclusions of law made by said Referee, that numbered 2 is contrary to law and not supported by valid findings of fact, and/or not supported by the records, papers and files herein in that at and before the time that Section 1260 of the Civil Code of the State of California was

amended to increase the homestead exemption from \$7500 to \$12,500.00, said Bankrupt had at least one creditor who was then and at the time of the filing of the original Petition herein, and who still is a creditor and therefore the homestead claimed by the Bankrupt may not exceed the sum of \$7500.00 in actual cash value.

Wherefore, your Petitioner prays that the aforesaid Referee's Order made and entered herein on the said 10th day of February, 1955, may be, by the Judge of the above-entitled Court reviewed and reversed; and that said Referee in Bankruptcy be, by the said Judge, directed to overrule the Bankrupt's Objections to Trustee's Report of Exempt Property, after due proceedings to be had herein in accordance with Section 39 (c) of the Bankruptcy Act; or for such other, further or different Order or relief as to this Honorable Court may seem just and proper in the premises.

/s/ JOHN O. ENGLAND,
Trustee

SHAPRO & ROTHSCHILD
/s/ By DANIEL ARONSON, JR.,
Attorneys for Trustee

Duly Verified.

[Endorsed]: Filed March 14, 1955.

In the United States District Court for the Northern District of California, Southern Division

No. 42844 (In Bankruptcy)

In the Matter of DANIEL E. SANDERSON,
Bankrupt.

ORDER

This is a petition for review of a referee's order sustaining objections to the trustee's report of exempt property. By his order, the referee set aside to the bankrupt three items of property which are here challenged. They raise different questions and are separately discussed.

The first item is a homestead exemption allowance in the amount of \$12,500. There is no question about the proper declaration of the homestead. The issue between the trustee and bankrupt arises out of the fact that the homestead exemption allowance provided by California before September 1, 1953 was in the amount of \$7,500, which amount was raised on that date to \$12,500. California Civ. Code, §1260. Some of the bankrupt's creditors became such before September 1, 1953, however, and under the law of California, these creditors are restricted only by the amount of the homestead allowance in force at the time of the contraction of the debt, *In re Rauer's Collection*, 87 C. A. 2d 248 (1948), or \$7,500. From this, the trustee argues that by virtue of the provisions of Section 70 (c) of the Bankruptcy Act (11 USC §110), he is entitled to proceed in the shoes

of any creditor, and may therefore be limited only by the lesser exemption, or \$7,500.

Section 6 of the Bankruptcy Act, so far as pertinent provides:

“This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition * * *.” (11 USC §24).

To allow the trustee here, who is acting for the general creditors who became such after September 1, 1953, as well as for those who became creditors earlier, to set aside the exemption of \$12,500, would manifestly deny to the bankrupt the exemption which the laws of California have given him against all but a specific group of creditors. Section 6 of the Act was intended to control the entire Act, including Section 70(c).

It is the conclusion of the Court, therefore, that the homestead exemption allowance of \$12,500 was proper, and the order of the referee is affirmed in that respect.

The remedy of those creditors whose rights under California law extend beyond the \$12,500 exemption is in the State Courts. Accord, *In re Buckley*, 24 F. Supp. 832 (W. D. La. 1938) (title to property exempt under state law does not pass to trustee, although creditors held valid waiver of exemption) and cases cited therein, at 835.

The constitutional issues raised by the briefs are not necessary to the decision of this case, and are not discussed.

The remaining items of challenged property were set aside to the bankrupt by the referee under the provisions of California Code of Civ. Proc., §690.4. The first of these items is classified as tools and implements of the bankrupt, coming within the first sentence of Section 690.4, which reads as follows:

“The tools or implements of a mechanic or artisan, necessary to carry on his trade;”

The property concerned, so far as set forth in the referee's order is: “1-14” band saw, 1-8” table saw, 1-6” planer, 1-11½ h.p. Duplex cut-off saw, 2 Skill saws, 6 picks, 6 shovels, 3 wrecking bars, 1 sledge hammer, miscellaneous small tools; hammer, saw, hand plane, screwdrivers, drills, bit, etc.” The trustee objects on the grounds that the bankrupt is not within the statutory definition of “mechanic or artisan” and that they are not “necessary to carry on his trade”. The referee made contrary findings on both points, after a hearing. The transcript of the hearing, which is a part of the record herein, reveals that the bankrupt testified that he was a building contractor, but that he also used every one of the named items personally, and hired others to use them under his immediate supervision, on those parts of a building contract which he did not contract out to other persons. He testified that he used these tools regularly, “at various times.” He further testified that he did not let out to other subcontractors the carpentry work and the common laborers' work, such as wrecking, which work he

supervised immediately, and for which he provided some of the tools named. It is a reasonable inference from the testimony of the bankrupt that he himself participated in the carpentry and wrecking work, together with others whom he hired for that work. Evidently, it is with this testimony in mind that the referee acted in treating the bankrupt as a "mechanic or artisan". It is instructive to note that in a previous federal case applying the same provision, the court allowed an exemption of a baker's implements, although the baker employed others to use the implements. *In re Petersen*, 95 F. 417 (D. C. 1899). The court there pointed out that "it must be understood that a baker would not be entitled to utensils and implements in number sufficient to carry on an extensive business, in the prosecution of which his own labor would be relatively a small factor, and of little value, when compared with the capital invested or the labor of others employed therein."

The court went on to say that the question of what tools and implements were necessary in a given case was a matter of fact, to be decided on common sense principles as each case arose. It has been said by California courts that their exemption statutes are to be liberally construed in case of doubt. See, *Security First National Bank of Los Angeles vs. Pierson*, 2 C. 2d 63, 38 P. 2d 784 (1938). The courts of California have exempted, under Section 690.4, the safe of a jeweler and watchmaker, *In re McManus*, 87 Cal. 293 (1890) and the instruments of a sexton, *Peebler vs. Danziger*, 104 C. A.

2d 490 (1951). There is sufficient basis in the instant record for the referee's conclusion in the case at bar that the described tools were necessary for the carrying on of the bankrupt's trade, and his order is affirmed in that respect as well.

The third item of property is office furniture of the bankrupt, used by him in his capacity as building contractor, including, as set forth in the referee's order, the following:

"1 typewriter, 1 adding machine, 1 check protector, and 1 recording calculator".

These items are not claimed by the bankrupt as tools of an artisan. They are plainly the office equipment of a businessman. Justification for exemption of these items, in excess of the amount of \$200 provided by Cal. C. C. P. §690.1, must be found in the remaining portion of Section 690.4. The remainder of that section sets forth with great particularity what items of their equipment may be retained by a great variety of persons in various occupation but makes no allowance for office furnishings in general for businessmen others than those specifically named. The single general clause relating to "typewriters or other mechanical contrivances employed for writing in type, actually used by the owner thereof for making his living" follows immediately upon the phrase "* * * also the typewriter of a stenographer, the typewriter of a newspaper reporter and the * * *." It would seem to have been intended, therefore, to apply to writing contrivances which were the principal equip-

ment of persons whose livelihood was made primarily from the use of such contrivances, and not to business persons who made use of typewriters as part of their general office equipment. It may be relevant to note here that the bankrupt testified that he did not himself know how to use the typewriter. In the absence of California decisions to the contrary, the detailed language of Section 690.4 compels the conclusion that no general exemption for office equipment was intended by the legislators, and that the referee was in error with respect to the above named items of office furniture. With the exception of the last item of property mentioned, the referee's order is sustained.

Dated: October 5, 1955.

/s/ EDWARD P. MURPHY,

United States District Judge

[Endorsed]: Filed October 6, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that John O. England, as Trustee of the estate of the above-named bankrupt, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that portion of that certain order of the above-entitled court made and entered herein on the 5th day of October, 1955,

by Hon. Edward P. Murphy, Judge of the above-entitled court, which sustained that portion of the order of Hon. Burton J. Wyman, Referee in Bankruptcy herein, dated February 10, 1955, whereby the bankrupt's exceptions to the Trustee's Report of Exempt Property herein were sustained, and there was allowed to the above-named bankrupt as exempt the real property in said bankrupt's Declaration of Homestead.

Dated at San Francisco, in said District, this 24th day of October, 1955.

SHAPRO & ROTHCHILD,

/s/ By DANIEL ARONSON, JR.,

Attorneys for Appellant, John O. England, as Trustee of the estate of the bankrupt, above-named

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 24, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this court in the above-entitled case and that they constitute the Record on Appeal herein as designated by the attorneys for the Appellant and Appellee:

Debtors Petition and Schedules A and B, Summary and Statement of Affairs.

Order of Adjudication.

Trustee's Report of Exempt Property.

Bankrupt's Objection to Trustee's Report of Exempt Property.

Certificate and Report of Referee to Petition for Review of Order of Referee.

Trustee's opening Brief in Support of Petition for Review.

Bankrupt's Reply in Opposition to Trustee's Petition of Review.

Petition for Review.

Trustee's Closing Brief in Support of Petition. Order.

Transcript, Objections to Trustee's Report of Exempt Property.

Declaration of Homestead.

Notice of Appeal—Trustee.

Designation of Contents of Record on Appeal—
Trustee.

Notice of Appeal—Bankrupt.

Designation of Additional Portion of Record on
Appeal—Bankrupt.

In witness whereof, I have hereunto set my hand
and affixed the seal of said District Court this 15th
day of November, 1955.

[Seal] C. W. CALBREATH,
Clerk

/s/ By WM. J. FLINN,
Deputy Clerk

[Endorsed]: No. 14953. United States Court of
Appeals for the Ninth Circuit. John O. England,
Trustee of the Estate of Daniel E. Sanderson,
bankrupt, Appellant, vs. Daniel E. Sanderson,
Bankrupt, Appellee. Transcript of Record. Appeal
from the United States District Court for the
Northern District of California, Southern Division.

Filed: November 23, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14953

JOHN O. ENGLAND, Appellant,

vs.

DANIEL E. SANDERSON, Appellee.

APPELLANT'S STATEMENT OF POINTS

Comes now John O. England, Appellant herein, and in accordance with Rule 17(6) of the Rules and Practice of the United States Court of Appeals for the Ninth Circuit specifies the following as a concise statement of the points on which he intends to rely on this appeal from the Order made and entered by the Hon. Edward P. Murphy, Judge of the United States District Court for the Northern District of California, on October 5, 1955, and more particularly specified and described in Notice of Appeal heretofore filed with the Clerk of said District Court on October 24, 1955, as follows:

I.

That the District Court in said Order of October 5, 1955, erred in sustaining the Order of the Referee in Bankruptcy dated February 10, 1955, insofar as said Order allowed the bankrupt a homestead exemption of the value of \$12,500.00.

II.

That the District Court in said Order of October

5, 1955, erred in finding that Section 6 of the Bankruptcy Act prevents the Trustee from denying a homestead exemption in excess of \$7,500.00.

III.

That the District Court in said Order of October 5, 1955, erred in finding that the remedy of those creditors whose rights under California law extend beyond the \$12,500.00 exemption is in the state court.

Dated: December 1, 1955.

Respectfully submitted,

SHAPRO & ROTHSCHILD,

/s/ By DANIEL ARONSON, JR.,

Attorneys for Appellant, John O. England, as Trustee of the estate of Daniel E. Sanderson, Bankrupt.

Acknowledgment of Service attached.

[Endorsed]: Filed December 6, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties hereto through their respective counsels of record that the Debtor's Petition and Schedules A and B filed with the United States District Court for the Northern District of California on April

12, 1954, may be considered by the above-entitled court in their original form without the necessity of being printed.

Dated: December 1, 1955.

SHAPRO & ROTHSCHILD,

/s/ By DANIEL ARONSON, JR.,

Attorneys for John O. England,
Appellant

JEFFERSON E. PEYSER,

/s/ By PEIRCE N. STEIN,

Attorneys for Daniel E. Sanderson,
Appellee

Acknowledgment of Service attached.

[Endorsed]: Filed December 6, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties here to through their respective counsels of record that the Order of Adjudication made in the above-entitled matter on the 13th day of April, 1954 and the Order approving Trustee's bond in the bankruptcy proceedings of the United States District Court for the Northern District of California may be considered by the above-entitled court in

their original form without the necessity of being printed.

Dated: December 7, 1955.

SHAPRO & ROTHCHILD,

/s/ By DANIEL ARONSON, JR.,

Attorneys for John O. England,
Appellant

JEFFERSON E. PEYSER,

/s/ By PEIRCE N. STEIN,

Attorneys for Daniel E. Sanderson,
Appellee

Acknowledgment of Service attached.

[Endorsed]: Filed November 8, 1955. Paul P. O'Brien, Clerk.

No. 14,953

United States Court of Appeals
For the Ninth Circuit

JOHN O. ENGLAND, Trustee of the Estate
of Daniel E. Sanderson, Bankrupt,

Appellant,

VS.

DANIEL E. SANDERSON, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

SHAPRO & ROTHSCHILD,

155 Montgomery Street, San Francisco 4, California,

Attorneys for Appellant.

DANIEL ARONSON, JR.,

155 Montgomery Street, San Francisco 4, California,

Of Counsel.

FILED

PAUL E. O'BRIEN, CLERK

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**United States Court of Appeals
For the Ninth Circuit**

JOHN O. ENGLAND, Trustee of the Estate
of Daniel E. Sanderson, Bankrupt,

Appellant,

vs.

DANIEL E. SANDERSON, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

The Referee in Bankruptcy on February 10, 1955, made and entered an order setting aside to Appellee a homestead exemption not exceeding the value of \$12,500.00, which order was made in the proceeding pending in the United States District Court for the Northern District of California, entitled "In the Matter of Daniel E. Sanderson, Bankrupt," being No. 42844, in the records and files of said court (T.R., p. 17). Appellant's petition to have the order reviewed by the District Court was filed on March 14, 1955 (T.R., p. 63). The Petition was timely (11 USCA Section 67(c)). The District Court had ju-

risdiction to review the order (11 USCA Section 67(c)). In an order made on October 5, 1955, the District Court affirmed the order of the Referee (T.R., p. 66). Notice of appeal therefrom to this court was filed October 24, 1955 (T.R., p. 71). The appeal was timely (11 USCA 48). Jurisdiction of this court to review the order of the District Court is sustained by 11 USCA 47.

STATEMENT OF QUESTION PRESENTED.

The question before the court is as to the allowance to the Appellee Bankrupt of an homestead in certain real property in excess of the sum of \$7,500.00.

STATEMENT OF FACTS.

On April 12, 1954 a voluntary petition in bankruptcy was filed by Daniel E. Sanderson, Appellee herein, in the Southern Division of the United States District Court for the Northern District of California, and on the following day he was duly adjudged bankrupt by said court (Transcript of Record, page 5.) On July 22, 1954, John O. England, Appellant herein, the duly elected, qualified and acting trustee of the estate of said bankrupt, filed his Trustee's Report of Exempt Property (T.R., p. 6) with said court, included in which was an exemption on the residence and apartment building located at 940 Potrero Avenue, San Francisco, to the extent of \$7,500.00. On

July 29, 1954 there was filed with said court bankrupt's Objections to Trustee's Report of Exempt Property (T.R., p. 7), stating, among other grounds hereinafter described, that the homestead exemption should have been of the valuation of \$12,500.00.

There is uncontroverted testimony that on September 1, 1953 when the California Homestead Exemption was increased from \$7,500.00 to \$12,500.00, the bankrupt was indebted to at least one creditor who has not since been paid (T.R., p. 23.)

On February 26, 1954 the bankrupt executed and recorded the declaration of homestead here in question (T.R., pp. 9 through 11).

Thereafter, after the hearing held on said objections on the 4th day of August, 1954, the Referee made and entered, on the 10th day of February, 1955, his order setting aside to Appellee a homestead exemption not exceeding \$12,500.00 (T.R., p. 17), and thereafter Appellant timely filed with the Referee his Petition for Review of said order, and thereafter a hearing was held on said Petition for Review before Hon. Edward P. Murphy, Judge of the United States District Court, and thereafter and on October 5, 1955, Judge Murphy made and entered his order (T.R., p. 66) here appealed from, said notice of appeal having been filed with said District Court on October 24, 1955 (T.R., p. 71).

ARGUMENT.

- I. THE DISTRICT COURT IN ITS ORDER OF OCTOBER 5, 1955, ERRED IN SUSTAINING THE ORDER OF THE REFEREE IN BANKRUPTCY DATED FEBRUARY 10, 1955 IN ALLOWING APPELLEE A HOMESTEAD EXEMPTION OF THE VALUE OF \$12,500.00, AND IN FINDING THAT SECTION 6 OF THE BANKRUPTCY ACT PREVENTS THE TRUSTEE FROM DENYING A HOMESTEAD EXEMPTION IN EXCESS OF \$7,500.00.

Prior to the amendment of Section 1260 of the Civil Code of the State of California in 1953, the bankrupt would have been entitled to a homestead exemption of a valuation of \$7,500.00 had he elected to record a declaration of homestead and, prior to said amendment raising the exemption to \$12,500.00, the bankrupt was indebted to at least one creditor who is still a creditor in these proceedings. Under Section 70c of the Bankruptcy Act (11 USCA 110c), the so-called "strong arm" clause, the trustee of this estate has, as of the date of bankruptcy, all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings upon the said real property. (See *Sampsell v. Straub*, 194 F. 2d 228.) While it is true that the Supreme Court in the case of *Lockwood v. Exchange Bank*, 190 U.S. 294, 47 L. Ed. 1061, held that exempt property does not pass to the bankrupt estate and the title thereto remains in the bankrupt, still, where there is an equity in the property over and above the applicable homestead exemption and all valid liens, the trustee can realize that equity for the benefit of the bankrupt estate. (*Blood v. Munn*, 155 C. 228, 100 P. 694.) In any event, the trustee succeeded to the rights of these prior creditors and under the doctrine of *Moore v. Bay*, 284 U.S. 4,

76 L. Ed. 133, the trustee, by subrogation, can enforce the rights of these prior creditors for the benefit of the bankrupt estate; and the estate is to be distributed among all creditors, irrespective of whether the allowed claims arose prior to the increase of the homestead exemption, or afterwards.

Neither the District Court nor the Referee discuss or distinguish the rights of the trustee under the doctrine of *Moore v. Bay*, *supra*, and the District Court stated that "the remedy of those creditors whose rights under California law extend beyond the \$12,500.00 exemption is in the State courts" (T.R., p. 67), which subject will be hereinafter discussed.

Both the District Court (T.R., p. 66) and the Referee (T.R., p. 31) refer to the case of *In re Rauer's Collection Co., Inc.*, 87 C.A. 2d 248, 196 P. 2d 803, and dispose of that decision by stating that it does not involve a bankruptcy proceeding, and thus the question of Section 6 of the Bankruptcy Act (11 USCA 24) is not involved.

In the *Rauer* case, the District Court of Appeal of the State of California stated, at page 253, as follows:

"That the increase in exemption cannot be given a retroactive interpretation, as it would be an impairment of the obligation of contracts, and *that the creditor is entitled to rely upon the exemption statutes as of the time the obligation was incurred, is well established. Medical Finance Assn. v. Wood*, 20 Cal. App. 2d Supp. 749, 63 P. 2d 1219), and *Smith v. Hume*, 29 Cal. App. 2d

Supp. 747 (74 P. 2d 566), dealt with the enactment in 1935 of Section 690.24 of the Code of Civil Procedure, making a motor vehicle of a value less than \$100 exempt from execution. No such exemption had theretofore existed. In both cases it was held that to give a retroactive effect to this statute would be in violation of the State and Federal Constitutions, as it would impair the obligation of contracts. (Emphasis added).

In *The Queen*, 93 F. 834, it was held that a California statute exempting from execution seamen's wages not exceeding \$100.00 "as applied to previous contracts made with seamen, at a time when no such exemption is allowed, would materially lessen and impair the obligation of such contracts." (P. 837) See also *In re Fox*, 16 F. Supp. 320, and Waples on Homestead and Exemption (1892), pp. 227-229.

"'It is settled that every statute will be construed to operate prospectively unless the legislative intent to the contrary is clearly expressed. . . . The rule that a statute is presumed to operate prospectively only, unless an intent to the contrary clearly appears, is especially applicable to cases where retroactive operation of the statute would impair the obligations of contracts or interfere with vested rights.' (*Jones v. Union Oil Co.* (1933) 218 Cal. 775, 777, 778 (25 P. 2d 5, 6); to same effect *People v. Allied Architects Assn.* (1927), 201 Cal. 428, 437 (257 P. 511). . . .

"But even if a retroactive intent can be found in the statute, the application of the new exemption to executions issued on pre-existing contracts is prevented by the provisions of the Constitu-

tions of the United States (Art. 1, Sec. 10) and of California (Art. 1, Sec. 16), forbidding laws impairing the obligation of contracts. . . . Statutory provisions creating new, or increasing old, exemptions have been considered several times by the United States Supreme Court, and it has uniformly held that their application to executions based on pre-existing contracts would violate the provisions of the Federal Constitution above referred to. (*Gunn v. Barry*, (1873), 15 Wall. 610 (21 L. Ed. 212); *Edwards v. Kearzey*, (1878), 96 U.S. 595 (24 L. Ed. 793); *Bank of Minden v. Clement*, (1921), 256 U.S. 126 (41 S. Ct. 408, 65 L. Ed. 857); *W. B. Worthen Co. v. Thomas*, (1934), 292 U.S. 426 (54 S. Ct. 816, 78 L. Ed. 1344, 93 A.L.R. 173))” (*Medical Finance Assn. v. Wood*, supra 20 Cal. App. 2d Supp. 749, 750, 751.)

“While it is competent for the legislature to change the form of remedy, if it can do so without impairing the obligation of contract, a statute increasing the exemption of debtors is void to the extent that it is applicable to contracts made prior to its enactment.” (12 Cal. Jur., p. 333).

93 American Law Reports, page 178 states that “the now generally accepted view” is that the remedy is inseparable from the contract itself, and contracts not reduced to judgment are held to be substantially impaired by the authorization of a new or increased exemption.”

The foregoing citation is a clear statement of the law of exemption rights in the State of California as decided by the highest appellate court of the State which has ruled on the question, and which has never

been overruled by that court or by the Supreme Court of the State of California.

We are aware of no decision on the question here involved by this, and the sole reported decision by a Federal Court in this Circuit involving this exemption question is Judge Yankwich's decision in the case of *In re Fox* (District Court, Southern District of California, Central Division, 1936), 16 F. Supp. 320. In that case, the court considered the exemption statutes of the State of California involving automobiles, increasing same from \$100 to \$250 in value and except that the instant case involves the homestead exemption provision, it is on all fours with the instant case, and that court held that such exemption provisions are unconstitutional insofar as they apply to debts incurred *before* they went into effect. The court stated at page 321, as follows:

"It is an accepted constitutional doctrine in the Courts of the United States that statutes establishing an exemption, *or increasing it materially*, are unconstitutional insofar as they apply to debts incurred prior to the establishment or increase of the exemption." (Emphasis added).

The District Court in the order complained of (T.R., p. 67) and the Referee (T.R., p. 28) refer to Section 6 of the Bankruptcy Act (11 USCA 24), which section reads in part as follows:

"This Act shall not affect the allowance to Bankrupts of the exemptions which are prescribed by the laws of the United States or by State laws in force at the time of the filing of the

Petition in the state wherein domiciled for six months immediately preceding the filing of the Petition or for a longer portion of such six months than in any other state . . .”

and hold that this section creates a situation where, under the Bankruptcy Act, the Federal Court is not bound by the State Court decision in the *Rauer* case because Section 6 allows exemptions which are “prescribed” by the laws of the United States or by the State laws “in force” at the time of the filing of the petition, and thus, since on April 12, 1954, Section 1260 of the California Code allowed a homestead exemption of \$12,500.00, such amount must be allowed to the Appellee Bankrupt. Referee Wyman further stated (T.R., p. 35)

“Consequently this Bankruptcy Court (if the *Rauer* Case ruling is to be followed) would have no maximum valuation figures to be used to limit the herein bankrupt’s homestead allowance, and hence there would be no ‘prescribed’ law ‘in force’, at the time of the filing of the petition in the above entitled bankruptcy proceeding to which this Bankruptcy Court could look to ascertain the maximum homestead valuation that could be allowed to the bankrupt.”

If this strained interpretation of the law were to be followed, it would be plain that a bankrupt would be entitled to an exemption of \$5,000.00 in excess of a nonbankrupt as to his creditors in existence at the time of the increase of the exemption. Appellant agrees that the exemption “prescribed” and “in

force'', at the time of the filing of the original petition in bankruptcy must properly be followed, but contends that the exemption laws ''prescribed'' and ''in force'' in the State of California on April 12, 1954 must be determined by examining the particular provisions involved as enacted by the legislative bodies and the interpretation thereof by the courts of competent jurisdiction. Federal courts are bound by state court exemption statutes. *Ralph v. Cox* (CCA 8th Cir.) 1 F. 2d 435. The determination of homestead exemption rights in the federal courts is governed by the statutes and decisions of the states. *First National Bank v. Glass*, 75 Fed 706. *In re Grodzins*, 27 F. Supp. 521, DC, SD, Cal. C.D. In the case of *In re Shepardson*, 28 F. 2d 353, a District Court for the Southern Division of California held that ''the right to claim exempt property, and the kind and quantity that is to be allowed to bankrupt debtor, are matters regulated wholly by law of the state within which the proceedings are had and the bankrupt resides.'' This latter case involved the homestead provisions of the State of California and though not specifically involving the value of such homestead, used the law of the State of California to determine the type of homestead. The same type of ruling involving the interest of a bankrupt in homestead property was by this court determined by reference to the decisions of the appellate court of the State of California in the case of *Russell v. Laugharn*, 20 F. 2d 95. In *Dixon, et al. v. Koplar, et al.*, (CCA 8 Cir.) 102 F. 2d 295, that court again established the principle

“Thus the rights of a bankrupt to property as exempt are those given to him by the state statutes; and the federal courts, sitting as courts in bankruptcy, will determine exemptions according to those statutes, and *the decisions of the courts of last resort of the states construing and applying those statutes.*”,

citing cases. This doctrine of *stare decisis* is ignored by both the Referee and the District Court in spite of the decisions above referred to and the case of *MacKenzie v. United States*, CCA 9, 109 Fed. 2d 540, in which case, involving tax liens, this court clearly applied said doctrine. This court said:

“The Federal tax lien is entirely statutory, and therefore its scope and effect are to be determined solely by the statute *and the decisions interpreting it.*” (Emphasis ours).

If the long established doctrine of *stare decisis* had been followed by the Referee and/or the District Court, there can be no question but that the law “prescribed” and “in force” on the date of the filing of the original petition would have the Appellee Bankrupt to a homestead exemption not to exceed \$7,500.00, and as against creditors in existence at the time of the increase in the exemption statute and under the provisions of Section 70c (11 USCA 110c) of the Bankruptcy Act, and *Moore v. Bay*, supra, hereinabove discussed, Appellant Trustee stands in the shoes of such creditors. By virtue of Section 70c of the Bankruptcy Act, the trustee has all of the rights, remedies and powers of a creditor holding a

lien upon the property of the bankrupt, whether or not such a creditor actually exists. In this connection we call the court's attention to *Sampsell v. Straub*, supra, and the recent decisions by the United States Court of Appeals in *Constance v. Harvey*, 215 F. 2d 571, in which that court held that the Trustee under Section 70c of the Bankruptcy Act was entitled to be in a position of an "ideal" hypothetical creditor whether or not a creditor existed at the time in question. This case was followed in *In re Gondola Associates, Inc.*, 132 F. Supp. 205.

In *Smith v. Hume*, 29 Cal. App. 2d Supp., 747, 74 Pac. 2d 566, cited in *Rauer's Collection Co., Inc.* supra, the court stated, at page 749, as follows:

"If the question were a new one, we would feel that there were considerable force in the appellant's argument, but the tendency of the Supreme Court of the United States has been to discountenance as violating Article 1, Section 10 of the Federal Constitution, *any extension of an exemption statute, substantially affecting the right of a pre-existing creditor to obtain satisfaction of his debt.*" (Emphasis added).

The ruling sought by the trustee in these proceedings is not only in accordance with the cases above cited, but also is in accord with the recent decision of Hon. Reuben G. Hunt, Referee in Bankruptcy of the United States District Court for the Southern District of California, *In the Matter of Zarmond Goodman*, bankrupt, No. 61202-HW in the records and files of that court, wherein Referee Hunt ruled

on December 23, 1954 that increases in the very same homestead exemption were invalid in regard to then existing creditors. On the identical facts as presented in this case, Hon. Evan J. Hughes, Referee in Bankruptcy of the United States District Court for the Northern District of California, also held the increase in homestead exemption invalid as to then existing creditors *In the Matters of Frank Towers and Melvin Towers*, Docket Nos. 13581 and 13583, respectively, in the files and records of the Northern Division of said District Court.

There does not appear to be any valid distinction in the fact that the homestead was filed after the effective date of the amendment raising the exemption any more than there would be any distinction in the cases increasing the value of the automobile exemption to \$250.00 if the automobile were acquired after the effective date of the raise in the exemption. This principle is best illustrated by the case of *The Queen*, (USDC, NDC) 93 Fed. 834, where the court held that a California statute exempting from execution seamen's wages not exceeding \$100.00 would have no effect as to contracts made *prior* to the time when the exemption was created. The obligation in this case was incurred *before* the statute increasing the exemption was enacted. However, in *The Queen*, the wages were earned *after* the statute became effective. *The Queen*, *supra*, clearly showed that it was not the effective date of the statute that is important, but *the date when the obligations were incurred*, as the vital point

is the impairment of the obligations, not the effective date of the statute.

“That the exemption statutes are to be given liberal construction is a well accepted principle of law with which the Appellant does not quarrel, but such liberal construction does not mean that the courts may enlarge the exemption or read into the exemption laws provisions not found there. The construction given to the statutes must be consistent with a true and just interpretation of their terms in view of the purposes for which they were enacted. Here, as in other cases of statutory construction, the court will not expand the meaning of the words or phrases appearing in the acts or indulge in so-called ‘judicial legislation’. It is not for the court, by dictum or decision, to create a right of exemption where none is found in the statute or to say that the legislature intended a larger grant of exemption than is given by the plain wording of the statute.”

22 *Am. Jur.* 10.

II. THE DISTRICT COURT IN SAID ORDER OF OCTOBER 5, 1955 ERRED IN FINDING THAT THE REMEDY OF THOSE CREDITORS WHOSE RIGHTS UNDER CALIFORNIA LAW EXTEND BEYOND THE \$12,500.00 EXEMPTION IS IN THE STATE COURTS.

The District Court in its order appealed from stated that the remedy of those creditors whose rights

under California law extend beyond the \$12,500.00 exemption is in the State Courts. (T.R., p. 67)

In support of this position, the District Court cited *In re Buckley* (District Court, Western District of Louisiana), 24 F. Supp. 832 on the theory that the prior lien creditors must seek their remedy in the state court and also that the title to exempt property under state law does not pass to the trustee in bankruptcy. However, the *Buckley* case clearly holds that where the fair value of the property exceeds the exemption, the Trustee may sell the property, and in this connection, see also *Blood v. Munn*, supra. In the case before the court, there are no lien creditors who could assert any rights in the state courts and thus any general creditor seeking to do so would be faced with an answer setting up the discharge of the obligation in these bankruptcy proceedings. In any event, the Trustee under the doctrine of *Moore v. Bay*, supra, succeeded to the rights of the prior creditors, and the only way that the prior creditors can be protected by law "prescribed" and "in force" is by their representation by the appellant Trustee in Bankruptcy under the provisions of Section 70c of the Bankruptcy Act hereinabove discussed.

In view of the facts and law hereinabove set forth, it is Appellant's contention that the statute passed by Legislature of the State of California increasing the homestead exemption from \$7,500.00 to \$12,500.00 is inoperative as against those creditors of the bankrupt Appellee who extended credit prior to the date

of its enactment, and thus that the bankrupt Appellee is entitled to a homestead exemption not to exceed the sum of \$7,500.00 in actual cash.

Dated, San Francisco, California,
March 5, 1956.

Respectfully submitted,

SHAPRO & ROTHESCHILD,

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Attorneys for Appellant.

DANIEL ARONSON, JR.,
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No. 14,953

United States Court of Appeals
For the Ninth Circuit

JOHN O. ENGLAND, Trustee of the Estate
of Daniel E. Sanderson, Bankrupt,
Appellant,

VS.

DANIEL E. SANDERSON, Bankrupt,
Appellee.

BRIEF FOR APPELLEE.

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United States Court of Appeals For the Ninth Circuit

JOHN O. ENGLAND, Trustee of the Estate
of Daniel E. Sanderson, Bankrupt,
Appellant,

vs.

DANIEL E. SANDERSON, Bankrupt,
Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

Appellee accepts the jurisdictional statement of appellant. (Brief, pp. 1-2.)

RESTATEMENT OF QUESTION PRESENTED.

Appellee prefers to restate the question involved before this court as follows: Was the District Court below correct in affirming the order of the Bankruptcy Referee in setting aside to the bankrupt a homestead as exempt "not to exceed \$12,500.00 in cash value" (T.R. 18) where at the time of filing of petition in bankruptcy the law of California allowed

a homestead exemption in such sum, or was this error because the bankrupt had one creditor existing at the time of the filing of his petition in bankruptcy who had become such at the time that the homestead exemption was fixed in the sum of \$7500.00, all other creditors having become such after the date of the amendment which increased the exemption to \$12,500.00?

STATEMENT OF FACTS.

The facts as stated in appellant's statement of facts are essentially correct and we will accept them as stated rather than to unnecessarily prolong this brief. (Brief, pp. 2-3.)

ARGUMENT.

- I. THE COURT BELOW DID NOT ERR IN AFFIRMING THE REFEREE'S ORDER SETTING APART THE HOMESTEAD EXEMPTION IN A SUM NOT EXCEEDING \$12,500.00.

The pertinent provisions of the Bankruptcy Act which apply to our problem are the following:

Section 2. (11 U.S.C.A. 11a(11).) This section recites that the courts of bankruptcy are invested with jurisdiction to

“(11) Determine all claims of bankrupts to their exemptions;”

Section 6. (11 U.S.C.A. 24.)

“6. This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed

by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State; Provided, however, that no such allowance shall be made out of property which a bankrupt transferred or concealed and which is recovered or the the transfer of which is avoided under this Act for the benefit of the estate, except that where the voided transfer was made by way of security only and the property recovered is in excess of the amount secured thereby, such allowance may be made out of such excess."

Section 47a(6). (11 U.S.C.A. 75a(6).)

"47. DUTIES OF TRUSTEES. a. Trustees shall . . . (6) set apart the bankrupt's exemptions allowed by law, if claimed, and report the items and estimated value thereof to the courts as soon as practicable after their appointment; . . ."

Section 70a. (11 U.S.C.A. 110a.)

"70. TITLE TO PROPERTY. a. The trustee of the estate of a bankrupt . . . upon his . . . appointment and qualification, shall . . . be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy . . . except insofar as it is to property which is held to be exempt, . . ."

Section 70c. (11 U.S.C.A. 110c.)

"c. . . . The Trustee, as to all property in the possession or under the control of the bankrupt

at the date of bankruptcy or otherwise coming into the possession of the bankruptcy court, shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists; . . .”

Under the provisions of these sections the following propositions appear to be clear beyond dispute:—

1. That the provision of the exemption laws, whether contained in the bankruptcy act or in state statutes, must be liberally construed—in the case of homesteads particularly for the purpose of protecting the family of the declarant.

Re Dudley (1947) 72 F. Supp. 943, particularly at 947, citing *Crawford v. Sternberg* (C.C.A. 8th 1915) 220 F. 73 at 76, reading:—

“This has become an established principle, because the statutes granting exemptions have made no such exemptions, and because the policy of such statutes is to favor the debtors, in the limited amounts allowed to them, by preventing the forced loss of the home and of the necessities of subsistence, and because such statutes are construed liberally in favor of the exemption.”

The *Dudley* case, *supra*, further is authority for the proposition that the claiming of an exemption through the device of purchasing exempt shares in a building and loan association, even while insolvent, cannot constitute a fraud upon creditors.

See also cases cited by Referee Wyman in his opinion (R.T. 25), including one decided by this circuit, *Dean v. Shephard* (C.C.A. 9) 26 F.2d 460, 461.

“The rule prevailing in California is that once the homestead has been created, the objects of the law require that as a matter of social policy, to the end that the humane purposes which the Legislature intended by its enactment shall be effected, the homestead shall be protected to the fullest extent, and the power of a creditor to attack the homestead by forced sale must be strictly limited to the instances specified in the law.”

Vieth v. Klett (1948) 88 C.A.2d 23, at 27, 198 P.2d 314.

2. That the “State laws” of exemption or homestead which apply are those which are in effect at the time of the filing of the petition in bankruptcy and at no other time. Section 6 of the Act expressly so states.

1 Collier on Bankruptcy (14th Ed.) 816 and cases cited, citing principally *White v. Stump*, 266 U.S. 310, 45 S.Ct. 103, 69 L.Ed. 301, which said

“that one common point of time is intended, and that is the date of the filing of the petition.”

3. That there is authority two ways as to the meaning of the words “prescribed by the laws of the United States or by the State laws in force” at the time of the filing of the petition.

a. The expression “prescribed by law” has been given the meaning of the actual legislation upon the

subject. *Duran v. Pickwick Stages System* (1934) 140 C.A. 103, 108; *Exline v. Smith*, 5 C. 112, 113.

b. An alternative meaning has been given to the expression as including not only the statute but the decisions of the courts of the state interpreting the same. 1 Collier on Bankruptcy, *supra*, 796.

If the first of the two constructions were to apply to our situation, that would put an end to the problem because it would then be clear that at the time of the filing of the petition by bankrupt section 1260 of the California Civil Code provided for a homestead exemption of \$12,500 over all liens and encumbrances. Hence a literal interpretation of section (6) would therefore require that the order of the Referee setting apart the homestead and the decision of the District Court should be sustained without further argument. While we urge this point upon this court, appellee feels that the second meaning can be accepted without weakening one bit the conclusion so reached.

4. That title to the homesteaded property does not at any time actually pass to the trustee or become a part of the bankrupt estate.

Section 70a of the Act, above quoted, states very clearly that title of the bankrupt passes to the Trustee "*Except insofar as it is to property which is held to be exempt*". A terse summary of the rights of the Trustee with respect to exempt property is set out in 4 Collier on Bankruptcy 975, as follows (Section 70.08 thereof):

"Exempt property constitutes one class of property that specifically does not pass to the trustee

under the Act. Section 70 provides that the trustee of the bankrupt's estate shall be vested with the title of the bankrupt 'except insofar as it is to property which held to be exempt'. This refers, of course, to the property declared exempt under § 6 of the Act, which section gives full effect to the exemption statutes of the states and the United States.

"... It is sufficient to recall here that while the trustee does not take title, he does have a temporary right of possession in order to perform his duty of setting the exemption aside. The bankruptcy court has jurisdiction only for the purpose of determining the exemption and the merits of the bankrupt's claim, and may not adjudicate other claims thereto, or compel a sale unless the exempt and non-exempt property are indivisible. . . ."

See also: *Lockwood v. Exchange Bank* (1903) 190 U.S. 294, 23 S.Ct. 751, 47 L.Ed. 1061, where at page 1063, Justice White stated:—

"The fact that the act of 1898 confers upon the court of bankruptcy authority to control exempt property in order to set it aside, and thus exclude it from the assets of the bankrupt estate to be administered, affords no just ground for holding that the court of bankruptcy must administer and distribute, as included in the assets of the estate, the very property which the act, in unambiguous language declares shall not pass from the bankrupt, or become part of the bankruptcy assets. The two provisions of the statute must be construed together, and both be given effect. Moreover, the want of power in the court

of bankruptcy to administer exempt property is, besides, shown by the context of the act; since throughout its text, exempt property is contrasted with property not exempt, the latter alone constituting assets of the bankrupt estate, subject to administration.

“Though it be conceded that some inconvenience may arise from the construction which the text of the statute requires, the fact of such inconvenience would not justify us in disregarding both its letter and spirit. Besides, if mere arguments of inconvenience were to have weight, the fact cannot be overlooked that the contrary construction would produce a greater inconvenience. The difference, however, between the two is this: That in the latter case—that is causing the exempt property to form a part of the bankruptcy assets—the inconvenience would be irremediable, since it would compel the administration of the exempt property as part of the estate in bankruptcy; whilst in the other, the rights of creditors having no lien, as in the case at bar, but having a remedy under the state law against the exempt property, may be protected by the court of bankruptcy, since, certainly there would exist in favor of a creditor holding a waiver note, like that possessed by the petitioning creditor in the case at bar, an equity entitling him to a reasonable postponement of the discharge of the bankrupt in order to allow the institution in the state court of such proceedings as might be necessary to make effective the rights possessed by the creditor.”

In the *Lockwood* case, *supra*, the Supreme Court held that even though a note of the bankrupt provided

for a complete waiver of his homestead rights, nevertheless the creditor could only assert his rights in the state courts since the bankruptcy act expressly negated the possibility of transfer of title to the Trustee or the jurisdiction of the bankruptcy court to administer exempt property as part of the estate assets, its only power being to determine that the exemption existed and setting it aside to the bankrupt. Many cases have since followed the doctrine of the *Lockwood* case, including the following more important ones:

Ingram v. Wilson (1903. C.C.A. 8th) 125 F. 913, at 915:

“ . . . never vested in the trustee and never became subject to administration . . . court was without power to order the sale of the homestead, and that its ‘order to that effect was erroneous, if not void’; also that the creditor ‘must seek such relief as he is entitled to under local laws in the courts of the state’.”

Re Remmerde (1913. D.C.-N.D. Ia.) 206 F. 822, at 826.

Re Vonhee (1916. D.C.-Wash.) 238 F. 422, at 428:

“If any creditor has a specific claim upon any of this property, it must be enforced in the state court.”

Duffy v. Tegeler (1927. C.C.A. 8th) 19 F.2d 305, at 308.

“If creditors claim that the property, while exempt generally, is not exempt from process to enforce their particular debts, they must resort

to a state court of competent jurisdiction to enforce payment of their debts out of such property. On proper application, the discharge should be withheld for a reasonable time to enable such creditors to institute and prosecute the necessary proceedings in the state court to protect and make effectual their rights against the property.”

Stein v. Bostian (1943. C.C.A. 8th) 133 F.2d 586, at 589.

“It may be true, as the referee points out, that the cash exemption set off to the bankrupt can be reached by his tax creditors through other proceedings, and that it would be convenient, expeditious and economical to have the court of bankruptcy order that the exemption be applied to the payment of the tax claims. That, however, does not alter the fact that Congress has not conferred upon the courts of bankruptcy jurisdiction to administer the exempt property of a bankrupt when a claim for exemptions has been filed, or to treat such property as any part of a bankrupt’s estate.”

“It was the duty of the trustee and of the court to safeguard the right of the bankrupt to his exempt property.”

Woodruff v. Cheeves (1901 C.C.A 5th) 105 F. 601—holding that the U. S. District Court is not entitled to entertain proceedings in the nature of a plenary proceeding to subject exempt homestead property to claims of certain creditors who held the bankrupt’s notes which contained provisions waiving the benefit of the homestead laws.

As part of this proposition number 4 it may be observed that another facet thereof compels the conclusion that the bankruptcy court's control over exempt property is one of extremely limited nature.

Chicago, B. & Q. Co. v. Hall (1912) 229 U.S. 511, 33 S.Ct. 885, 57 L.Ed. 1306, at page 1309, described that control in these words:

“. . . It is true that title to exempt property does not vest in the trustee, and cannot be administered by him for the benefit of the creditors. But it can 'pass to the trustee as a part of the estate of the bankrupt' for the purposes named elsewhere in the statute, included in which is the duty to segregate, identify, and appraise what is claimed to be exempt. He must make a report . . . In other words, the property is not automatically exempted, but must 'pass to the trustee as a part of the estate'—not to be administered for the benefit of creditors, but to enable him to perform the duties incident to setting apart to the bankrupt what, after a hearing, may be found to be exempt. Custody and possession may be necessary to carry out these duties, and all levies, seizures, and liens obtained by legal proceedings within the four months, that may or do interfere with that possession, are annulled . . . the liens rendered void by 67f are those obtained by legal proceedings within four months. The section does not, however, defeat rights in the exempt property acquired by contract or by waiver of the exemption. These may be enforced or foreclosed by judgments obtained even after the petition in bankruptcy was filed, under the principle de-

clared in *Lockwood v. Exchange Bank*, 190 U.S. 294, 48 L.Ed. 1061, 23 S.Ct. 751."

To the same effect:

Gardner v. Johnson (1952. C.C.A. 9th)—where held that referee could determine that failure to claim exemption at time of filing petition would constitute a waiver of the homestead; and further that her prior transfer of the homesteaded property to her daughter would in any event have constituted an abandonment thereof.

Appellant recognizes that the *Lockwood* case is still law (Brief, p. 4) but cites *Moore v. Bay* (1931) 284 U.S. 4, 76 L.Ed. 133, 76 A.L.R. 1198 to the effect that under the strong-arm provision of the Act the Trustee has the right to set aside a state given right of exemption as to certain creditors merely because as to another creditor the same right of exemption exists but in a smaller amount. Consideration will be given to this case in a later part of this brief, but it is sufficient to state at this point that the *Moore* case involves the matter of constructive fraud against creditors by failure to observe certain requirements of California Civil Code 3440, and does not touch upon or consider in any wise the application of the exemption provisions of the bankruptcy act.

5. If at the time of the filing of the petition in bankruptcy, the exemption is of the kind that constitutes an exemption generally, the setting aside of the exemption to the bankrupt is not impaired or pre-

cluded merely because also at that time some one creditor of the bankrupt has a right which permits him to assert rights in the property which could not be availed of by other creditors. In such cases, the bankruptcy court has no jurisdiction to determine such adverse claims or priorities therein, but does have the right to hold up a discharge in bankruptcy until resort is had to the state courts of competent jurisdiction to determine such adverse claims or priorities.

The foregoing proposition is a corollary to proposition number 4 above, and has been alluded to therein. The cases which support it are the same as those heretofore cited under that proposition number.

6. Section 70c of the Bankruptcy Act,—(11 U.S.C.A. 110c)—, which is the “strong-arm” provision of the Bankruptcy Act, “strong arms” the trustee in bankruptcy in exemption cases only for the purpose of determining if a valid homestead does or does not exist at the time of the filing of the petition in bankruptcy, or if there has been a conveyance of the homestead prior thereto which constituted an abandonment of the same, or a situation where elements of fraud exist which would destroy the right to the exemption and thus make the property available for the whole estate.

An early case called upon to deal with this specific subject was decided by this very Court of Appeals (9th Circuit) in 1914 in the case of *Brandt v. Mayhew*, 218 F. 422. At that time under the laws of California a homestead could be declared upon real property even after the filing of the petition in bank-

ruptcy, which was done by the wife of the bankrupt after they had jointly made general assignment for the benefit of creditors, which included the property described in the homestead subsequently filed. The bankrupt made claim to the homestead on the basis of his wife's filing which the trustee denied, but which the referee allowed. The trustee on appeal from order of the District Court affirming the referee contended that the "strong-arm" provision (then section 47a(2)) superseded the provisions of section 6 (still the same) and those of the first part of section 70a (still the same excepting exempt property from vesting in the trustee) and being in the position of a lien creditor could set aside the exemption in its entirety. On page 426 of 218 F., Judge Gilbert denied this and for the court stated:—

"The argument is that the amendment puts the trustee, as to all property in the custody of the bankruptcy court, in the position of a creditor holding a lien by legal or equitable proceedings, and, as to all other property, in the position of a creditor holding an execution returned unsatisfied, and that it follows that the trustee in the case at bar is in the attitude of a lien creditor as to the real estate which is claimed as a homestead, and that his lien represents the entire indebtedness against the bankrupt, so as to exclude a claim of homestead exemption. We do not so construe the amendment. Section 6 of the act remains unamended and unrepealed. The amendment does not affect the provision of that section, in which the intention of Congress is plainly expressed, that the Bankruptcy Act shall not affect the allowance to bankrupts of the ex-

emptions which are prescribed by state laws. Section 6 still remains one of the fundamental provisions of the act, and it is the duty of the courts to construe the act with all its amendments as a whole, and to harmonize all its parts. The purpose of the amendment to 47a was to make effective the rights of creditors against those who claimed secret or unrecorded liens or adverse interests in the property of the bankrupt. Before the amendment was vested with no better title to the bankrupt's property than the bankrupt had at the time when the trustee's title accrued. He stood in the shoes of the bankrupt, and where, under the law of the state, a conditional sale, a vendor's lien, or an unrecorded mortgage was good between the parties, it was good against the trustee. The amendment gives the trustee the right to attack all such unrecorded liens and secret equities, without requiring that he shall be in the position of representing creditors who have acquired liens by legal or equitable proceedings against the bankrupt . . ."

A case of recent decision by this 9th Circuit which considered the effect of section 70c and its application to a situation where the claim of homestead was filed AFTER the filing of the petition in bankruptcy is that of *Sampsell v. Straub* (1951. Cert. Den. 1952) 194 F. 2d 228, cited by appellant (Brief, p. 4). This court there determined solely that the trustee with the powers given him under section 70c could attack the recording of a homestead AFTER date of bankruptcy because he stood in the position of a creditor who had a judgment lien prior in time thereto at the

time of the filing of the petition, even though the judgment lien must be perfected by the doing of a voluntary act by the judgment creditor, namely the filing of an abstract of judgment. The net result of the decision was to hold that no exemption in fact existed at all at time of filing of petition in bankruptcy, and that therefore the property was properly part of the bankrupt estate. The circumstances there are completely different from the case at bar where no question has been raised herein about the validity or timing of the recording of the declaration of homestead by Mr. Sanderson. There is no suggestion of fraud, direct or constructive, against any creditors. It follows therefore that the law and procedure above mentioned under propositions numbered 4 and 5 still apply and must be followed. Nor does *Moore v. Bay*, supra, compel any contrary conclusion. That case on its face, clearly establishes a fraud situation and therefore under section 67 of the Bankruptcy Act the trustee had the right to set aside the chattel mortgage,—as to which the procedure of Civil Code 3440 had not been followed,—as a constructive fraud and declare it void in toto as against all creditors. No exemption rights were involved or considered in that case.

From the foregoing propositions, a logical development of those principles results in the following result and no other:—

That the general exemption of the homestead declared by Mr. Sanderson existed at the time of the filing of his petition in bankruptcy which entitled

him to assert as to all creditors except one an exemption of \$12,500, and as to only one an exemption of \$7,500. There being no element in the case at bar of improper, invalid, or fraudulent declaration of homestead, no element of waiver, abandonment, or fraudulent preference within four months of bankruptcy involved, the sole duty of the trustee, after determining values and items making up the exemption, was to so report to the referee in bankruptcy, and the sole jurisdiction of the bankruptcy court was to order the exemption set aside. If necessary, on application of the one creditor who might be entitled to assert rights in the smaller amount of homestead (which at all times existed and was in effect as to all creditors) the bankruptcy court could have stayed Mr. Sanderson's discharge until that creditor's rights had been so declared in the state courts. But beyond this, the jurisdiction of the bankruptcy court was exhausted.

II. APPELLANT'S ARGUMENT IS NOT PREDICATED UPON FIRM GROUND.

The appellant states (Brief, pp. 4-14) that the homestead can not be set aside and the rights of the creditors claiming special treatment should not be determined in the state courts because:—

(1) The increased amount of exemption from \$7,500 to \$12,500 at the time that one creditor was existing to that extent constituted an impairment of the obligation of contract as to that one creditor so involved, and that as to that creditor the bankrupt

was left with only an exemption of \$7,500 rather than \$12,500; and

(2) (Step number 2)—Under section 70c of the Bankruptcy Act the trustee in bankruptcy can “strong-arm” the situation into one where he can assert that as to ALL creditors the same limitation existed—even though it might be recognized that under California law there is no question but that the homestead is valid and in full force and effect as to ALL creditors in the larger sum except the one creditor previously mentioned.

For the first of the foregoing propositions, appellant relies upon the decision of *In re Rauer's Collection Co., Inc.* (1948) 87 C.A. 2d 248, 196 P. 2d 803, (Brief, p. 5); *In re Fox* (D.Ct.So.D.Cal. Yankwich 1936) 16 F. Supp. 320 (Brief, p. 8); *Smith v. Hume*, 29 C.A. 2d 747, 74 P. 2d 566 (Brief, p. 12) and certain decisions of the Referee in Bankruptcy of the U.S. Dist. Ct. for the Southern District (Brief, pp. 12-13); *The Queen* (D.Ct.N.D.-Cal.) 93 F. 834 (Brief, p. 13), all of which hold that as to a particular creditor an exemption increase by statute is to the extent of the increase an impairment of the obligation of contract as to existing creditors. But the holding that an obligation of contract is impaired as to a particular creditor does not impel a decision that a part of the exemption of the homestead is lost as to all creditors, either by logic or by clear implication of the Bankruptcy Act.

In the first place it may be observed that the objects of the prohibition against the impairment of

obligation of contract contained in the Federal Constitution (Article I, section 10) are the States themselves, not the Federal government. The California Constitution (Article I, section 16) carries the same provision, self-imposed. There is no prohibition anywhere in the Federal Constitution against Congress acting through authorized legislation—(Federal Constitution Article I, section 8, subsection 4—establishing uniform bankruptcy laws)—to do all things necessary to carry out the purposes thereof, even though the obligation of contracts is impaired.

“Bankruptcy Acts avowedly work an impairment of the obligation of contracts, especially where they contemplate a discharge of the debtor from his debts. The provision of the Constitution of the United States that no state shall pass any law impairing the obligation of contracts is, in its terms, a limitation on the powers of the states only, and neither it nor any other clause forbids the Congress of the United States, when acting within the scope of its powers, to enact laws which may operate to impair the obligation of contracts. The grant of power to Congress to legislate on the subject of bankruptcies includes the power to impair the obligations of contracts, notwithstanding the individual states are forbidden so to do. Legislation may be valid as enacted under the express power to establish uniform laws on the subject of bankruptcy, although framed and drawn for the direct purpose of relieving insolvent persons in whole or in part from the payment of their debts. Congress, while without power to impair the obligation of contracts by laws acting directly and independ-

ently to that end, undeniably has authority to pass legislation pertinent to any of the powers conferred by the Constitution, irrespective of a collateral or incidental effect of the legislation to impair or destroy the obligation of private contracts. The constitutional provision conferring upon Congress the power to legislate on the subject of bankruptcy is read into contracts as constituting a part thereof . . .”

6 Am.Jur. 554, 555, Bankruptcy, section 7.

When therefore we assert that the *Rauer Collection* case, heretofore cited, does not necessarily control because it does not involve bankruptcy proceedings, but only a matter of interpretation of state laws in state courts (see Appellant’s Brief, p. 5) we believe we are making a valid and important distinction. Valid,—because the impairment of obligation prohibition was binding upon the California Supreme Court and the Court was perforce compelled to interpret state laws apart from any consideration of bankruptcy matters (a Federal matter) in which Congress may validly authorize such impairment; and Important,—because section 6 of the Bankruptcy Act expressly states that the law *in effect at the time of filing the petition in bankruptcy* controls the exemption. If this includes not only the exemption but the amount, then the only logical conclusion is that the exemption of the homestead exists in the sum of \$12,500 for all purposes, even though it might have the effect of increasing the exemption as to the pre-existing creditor himself. In other words, once the bankrupt goes into the Federal Court and petitions

in bankruptcy and asserts his exemption, any creditor of his is affected immediately by the provisions of the bankruptcy act and the only result, upon an exact and literal reading of section 6 of the act (supplemented by such cases as *Duran v. Pickwick Stages System* (1934) 140 C.A. 103 and *Exline v. Smith*, 5 C. 112, which define "prescribed by law" as only to embrace statutory law), would be that he is entitled to the exemption then "in force" of \$12,500 and nothing less, and this even though a creditor who might be entitled to some sort of priority under state law in the homesteaded property and as to which his right or priority would necessarily be impaired. Therefore to state that the increase of exemption constituted an impairment of obligation of contract under state law, and ergo, that under the bankruptcy act the impairment must be recognized, is to make a false assumption. Otherwise, the words "in effect" are meaningless. And to disregard the *Rauer* decision on the ground that while it may be a proper decision in so far as it may apply to state action and to the respective rights of creditors in homesteaded property when asserted in state courts and in state proceedings is not necessarily doing violence to the construction of the bankruptcy act which by section 6 unqualifiedly declares the bankrupt to have all those exemptions "prescribed by" the laws of California—in this case, the full measure of statutory rights under Civil Code Section 1260.

But it is not necessary to rest our argument on that ground alone. Even assuming that the "laws of Cali-

fornia'' which are referred to in section 6 of the Bankruptcy Act mean the statute (C.C. 1260) plus the *Rauer* and other decisions interpreting the same, yet it does not follow that the second proposition asserted by the appellant is validly grounded.

First, as heretofore noted in this brief, section 70c of the Act does not supersede or annul or modify section 6 of the Act. It must be considered in light of the provisions of section 6 and the purposes of section 6, about which we have heretofore rather fully alluded under proposition 6 of section I of this brief, together with authorities cited.

Secondly, section 70c was not enacted to destroy valid exemptions which are not subject to attack for fraud, waiver, abandonment, invalidity and similar grounds which equitably and properly require the property which is claimed to be exempt to become part of the bankrupt estate. For example in the case of *Sampsell v. Straub*, decided by this court in 1951, heretofore cited, this court determined that since the homestead was not claimed within time it should not be recognized at all. That does not present the same situation as in the case at bar, because in the *Sampsell* case it was correctly held that the late recording of the homestead had no validity at all against all creditors, there being none who had any special rights, and none who existed after a valid homestead might have been claimed, whereas in our case we have a validly claimed homestead which is acknowledged to be good against both prior creditor and subsequent creditors, the only contention being that as to the prior creditor

he might be able to assert some additional right which the state laws recognize as against the subsequent ones. In our case there is no suggestion of any waiver, abandonment or other weakness which in any degree would affect or destroy the homestead which existed at the time of the filing of the petition in bankruptcy.

What the trustee in bankruptcy in effect is attempting to accomplish is to assert that since the \$7,500.00 amount is the maximum limitation as to one creditor it must stand in the bankruptcy proceedings as the maximum limitation as to all creditors of the bankrupt. This, even though the same result would not obtain under state law. The incongruity of such a result is immediately apparent. Such a result would not carry out the purposes of the Bankruptcy Act, but in fact would actually violate its spirit and intent—which is to give relief to debtors entitled thereto—by giving greater rights to the creditors of a bankrupt in exempt property (those who became such subsequent to the increase of the homestead exemption, and therefore valid and enforceable as to them under the *Rauer* decision) than they possessed under state law at the time of the filing of the petition in bankruptcy. Thus this construction would permit the enforcement of laws which are NOT those “in effect at the time of the filing of the petition in bankruptcy” which section 6 of the Bankruptcy Act expressly requires. To adopt an expression of Judge Yankwich in the *Dudley* case, 72 F. Supp. 943, 947, this would mean reading into the statute “restrictions which are not there. And this we cannot and should not do.”

We find the purpose of section 70c tersely explained by this court (9th Circuit) in the *Sampsell* case (*Sampsell v. Straub*, 194 F. 2d 228), where at page 231 we read:

“Section 70, sub. c on the other hand is employed primarily to protect general creditors of the bankrupt against secret liens. To this end the trustee is given all the rights which a lien creditor by legal or equitable proceedings would enjoy.”

Thus the intent of section 70c is to put the trustee in position to avoid transfers or claims of interest which would be in the nature of fraud or inequity to assert against creditors or the estate. We have no such considerations in the case at bar.

It is submitted therefore that the argument of the appellant loses force and validity when considered in the light of the foregoing discussion and authorities cited.

III. THE DISTRICT COURT DID NOT ERR IN DETERMINING (T.R. 67) THAT THE REMEDY OF CREDITORS WHOSE RIGHTS UNDER CALIFORNIA LAW EXTENDED BEYOND THE \$12,500.00 EXEMPTION IS IN THE STATE COURTS.

In keeping with the principle which has been repeatedly announced in the Federal Courts, the cases respecting which have been cited heretofore in this brief under proposition number 4 of point I of Argument, and also alluded to in proposition number 5 thereof, title to Mr. Sanderson's homestead never at any time passed to the trustee in bankruptcy herein for the purpose of general administration in this

bankrupt estate. To the cases heretofore cited should also be mentioned the following:

Re Carl (D.Ct. Ark. 1941) 38 F. Supp. 414;

Baumbaugh v. L. A. Morris Plan Co. (C.C.A. 9th) 30 F. 2d 816;

Re Buckley (D. Ct. La.-1938) 24 F. Supp. 832 and cases cited on page 835 thereof.

As a direct corollary thereof it followed, as these cases determined, that since the bankruptcy court had no jurisdiction to determine claims of priority in exempt property it could only hold up the discharge of the bankrupt until the matter had been determined in the state court and then determine the extent of the discharge to which the bankrupt was entitled.

Appellant states (Brief, p. 15) that the *Buckley* case clearly held that the trustee could sell the exempt property where the fair value exceeded the exemption. The *Buckley* case did not so "clearly hold" or hold at all to that effect. The case determined that where the referee had ordered a sale of the exempt property the "ruling of the Referee was erroneous and that all this court has jurisdiction to do is to direct the trustee to set aside the property scheduled as exempt, leaving the creditor Wyatt to his remedies in the State Court." (p. 835 of 24 F. Supp.) Creditor Wyatt there claimed a priority by mortgage in the exempt property. In its treatment of the situation, the court, p. 834, stated:

"The title to the property exempt under the laws of the State does not pass to the trustee, and it

is his duty, when claimed, to set it aside as such when it becomes clear that the bankrupt is a person entitled to claim it, as here, and the fair value of the property does not exceed the amount allowed by the State law. The bankruptcy court has jurisdiction only for the purpose of determining these matters and cannot require its sale, even on the petition of creditors holding a waiver, or otherwise entitled to compel the application of the exempt property to the satisfaction of their claims.”—citing many cases.

This was followed by the *Carl* case, *supra*, and by Judge Murphy in the court below, and we submit rightly so.

CONCLUSION.

For the foregoing reasons, we respectfully submit that the decisions of Referee Wyman and of Judge Murphy were both correct, and that they can be sustained either on the ground that:

1. Under section 6 of the Bankruptcy Act, the law in effect at time of the petition in bankruptcy specified a homestead exemption of \$12,500.00 without exception as to any creditor; or

2. If as to any one creditor the maximum amount of the homestead exemption under the law of California could only be asserted in a lesser sum than specified by statute at the time of the filing of the petition in bankruptcy, his remedy was to ask the bankruptcy court to hold up the discharge of the bankrupt for a reasonable time until he could go into

the state courts to determine his rights, the state courts being the only forum in which he could assert the same.

Dated, San Francisco, California,

May 7, 1956.

Respectfully submitted,

JEFFERSON E. PEYSER,

Attorney for Appellee.

LEONARD S. LURIE,

Of Counsel.

No. 14,953.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN O. ENGLAND, trustee of the Estate of DANIEL E.
SANDERSON, Bankrupt,

Appellant,

vs.

DANIEL E. SANDERSON, Bankrupt,

Appellee.

BRIEF OF AMICUS CURIAE.

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DANIEL E. SANDERSON, Bankrupt,

Appellee.

BRIEF OF AMICUS CURIAE.

We have been permitted to appear in the within Appeal as *Amicus Curiae*.

We respectfully urge (and are confident we can demonstrate) to this Court that the United States District Judge erred in affirming the Referee's Order in setting apart the homestead upon the basis of the \$12,500 exemption.

Principle of Uniformity of National Bankruptcy Act.

Basically the National Bankruptcy Act provides for uniformity in the treatment of creditors. It likewise provides for the exemption to which the bankrupt is entitled (Sec. 6). This objective is reached by the provision that the right to exemptions are those prescribed by the law of the United States or *State Law*, and thus there is a uniformity provided, at least within the boundaries of the several states.

Treatment of Exempt Property in Bankruptcy Administration.

The property which is eventually set aside to the bankrupt as exempt, obviously does not become a part of the bankrupt estate. (Sec. 70a of the National Bankruptcy Act.)

In connection with the homestead exemption problem, however, there is sometimes involved an administration of the real property upon which the bankrupt has a valid homestead exemption wherein the valuation exceeds the homestead valuation to which the bankrupt is entitled. The Bankruptcy Court, after establishing the amount of the homestead exemption, must administer for the benefit of creditors the surplus. It sells the property and sets aside to the bankrupt his established exemption in cash. The procedure adopted by the Bankruptcy Court and approved by the title companies in the passage of title is synchronized to the provisions of the California Civil Code, Title 5, Chapter 1, Sections 1237 to 1261. (*Blood v. Munn*, 155 Cal. 228.)

The bankrupt, in order to retain his home in lieu of the cash exemption is permitted to pay into the Bankruptcy Court the cash representing the non-exempt portion thereof.

Russell v. Laugharn, 20 F. 2d 295.

The writer of this brief acted as trustee in the bankruptcy proceeding involved in the said appeal and the Court established the rule referred to which has been a directive in many subsequent administrations:

“It would seem unnecessarily harsh to require the property to be sold if the bankrupt is willing to pay to the trustee the net value of her non-exempt interest. . . .”

We have encountered cases in which a division of the property brought about the same equitable result.

We cannot with a generalization say that the Bankruptcy Court is not involved in the administration of homestead property. For an example: Let us take a residence with a sale's valuation of \$50,000, with the bankrupt's homestead exemption of \$7,500 or \$12,500 or any other lesser amount. This problem has many times confronted the bankruptcy administration, although we know of no decision other than *Russell v. Laugharn, supra*, which has reached the appellate court. The bankruptcy court is the only court which has jurisdiction (Sec. 2(11) of the National Bankruptcy Act). On the one hand, it must set aside the exemption to the bankrupt to which he is legally entitled, and on the other, it must administer and distribute to creditors the non-exempt portion of the property.

California Homestead Exemption.

The homestead exemption to the head of a family was increased from \$7,500 to \$12,500 on September 15, 1953. The homestead is secured by the recordation of the Declaration of Homestead.

The Appellee has set forth rather extensively in his brief the case of *Brandt v. Mayhew*, 218 Fed. 422, with extensive quotations and excerpts therefrom. This case of the United States Court of Appeals for the Ninth Circuit's decision in 1914 determined that Section 6 (the exemption section of the National Bankruptcy Act) was paramount and that the same was mandatory. The section requires that there be set aside to the bankrupt the exemptions provided by the state of his domicile at the instant

of bankruptcy. It determined that the rights of the creditors under the state law and/or the rights of the trustee under the provisions of Section 47a (now 70c) could not effect or impede the right of exemption. The argument which was there unsuccessfully advanced to the appellate court in *Brandt v. Mayhew*, was rejected, to-wit: from page 426:

“The petitioner contends that the right which the bankrupt would have to a homestead exemption under the bankruptcy law before the amendment of June 25, 1910, is taken away by that amendment, which adds to section 47a(2) the following:

“‘And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied.’”

This rule of law was followed for many years in this Circuit. Then we had the case of *White v. Stump*, 266 U. S. 310 (1924), which reversed a judgment of the United States Court of Appeals for the Ninth Circuit and determined that the Declaration of Homestead should be filed before the filing of the bankruptcy petition.

This case determined the point upon the “line of cleavage” theory. The United States Supreme Court in 1943 in the case of *Myers v. Mattley*, 318 U. S. 622, determined that under the Nevada law, the homestead could be selected at any time before actual judgment execution sale and therefore the trustee’s rights and

powers under Section 70c could not bar the exemption. From page 624:

“The trustee, as to all property in possession and under the control of the bankrupt at the date of bankruptcy, is deemed vested as of that date, with all the rights and remedies of a creditor then holding a lien thereon by legal or equitable proceedings. . . .” (Sec. 70c.)

The rights of the trustee under Section 70c (formerly 47a) do not deal alone with “fraud” as Appellee asserts. Instead the section grants to the trustee a status of a creditor with a lien on the property by legal (or equitable) proceedings as delineated in *White v. Stump*, *Sampsell v. Straub*, and the many other cases interpreting the said section.

We then come to the original case of *Sampsell v. Straub*, 189 F. 2d 379 (of this Circuit). The rule of *Myers v. Mattley*, was followed. However, upon rehearing the Court, took full cognizance of the rights and powers of the trustee under the provisions of Section 70c with respect to homestead exemptions, and reversed its former determination. (*Sampsell v. Straub*, 194 F. 2d 228—Writ of Certiorari denied, 1952.) In giving full recognition to the trustee’s rights and powers, the court determined that in California the Declaration of Homestead must be filed before the bankruptcy proceeding.

Obviously the point involved in these cases is not the identical point here before the Court. We have taken the liberty of digressing on this subject in order to call to the attention of the Court the development of the law with respect to the trustee’s rights and powers under Section 70c in matters pertaining to Section 6 and particularly in connection with homestead exemption.

In order to clarify our argument, we will immediately exclude from our consideration that type of claim, where by contract, the bankrupt waives his exemption. We would like to observe however, that such waiver has been declared to be against public policy in California. (*Industrial Loan and Investment Company of San Francisco v. The Superior Court*, 189 Cal. 546.) We also exclude those obligations which, both by the law of various states (and under Sec. 1241 of the Cal. Civ. Code), are excluded from the effect of a Declaration of Homestead. We will also exclude a consideration of liens on homestead property.

The Appellee has cited several cases which determine that the Bankruptcy Court in the treatment of homestead exemptions does not concern itself with the treatment of such claims and relegate them to the state court after the exemption is set aside. The cases cited by Appellee with respect thereto have no bearing on the instant problem.

Are Exemption Statutes Retroactive as Against Prior Creditors.

The rule is uniform that the subsequent exemption statute cannot affect the rights of the prior creditors, starting with the case of *Nichols v. Eaton*, 91 U. S. 716, and in California, the recent case of *In re Rauer's Collection Co.*, 87 Cal. App. 2d 248, 196 P. 2d 803.

Statutes establishing exemptions (increasing the amount thereof) are as to existing debts unconstitutional.

W. B. Worthen Co. v. Thomas, 292 U. S. 426;

In re Fox, 16 Fed. Supp. 320. Decision by United States District Judge Leon R. Yankwich, Southern District of California, Central Division. Citing numerous cases.

The Appellee apparently dismissed this point from consideration and contends it was the intention of Congress in passing the National Bankruptcy Act to permit Section 6 to take over and destroy this basic principle. Most certainly there was no such legislative intent. Let us assume we have a bankruptcy estate in which all of the creditors were in existence at the time of the establishment of a new or enlarged exemption. It is hardly conceivable we would then have a result that the rights of those creditors as against the assets, which under the state law were not exempted as against creditors' claims, would nevertheless be exempt because of the advent of bankruptcy. We know of no such decision.

Rights and Powers of the Trustee Under the Provisions of Section 70c.

We now come to a consideration of the sole point involved in this appeal. We have a creditor (or creditors) in existence on the date of the enlargement of the exemption valuation.

United States District Judge Edward P. Murphy stated in his Order affirming the Referee's Order on Review, dated October 5, 1955:

"Some of the bankrupt's creditors became such before September 1, 1953, however, and under the law of California, these creditors are restricted only by the amount of the homestead allowance in force at the time of the contraction of the debt, *In re Rauer's Collection*, 87 C. A. 2d 248 (1948) or \$7,500.—The remedy of those creditors whose rights under California law extend beyond the \$12,500 exemption is in the State Courts. Accord, *In re Buckley*, 24 F. Supp. 832 (W. D. La. 1938) (title to property

exempt under state law does not pass to trustee, although creditors held valid waiver of exemption) and cases cited therein at 835. . . .”

Thus we see these pre-existing creditors are directed to go to the state court for the enforcement of their rights as against the increase in the homestead exemption.

Section 70c provides to:

“The trustee, as to all property *whether or not coming into possession or control of the court*, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.” (Emphasis ours.)

It will be noted that this covers “all property in possession of the bankrupt.” Also “*whether or not the same comes into the possession or under the control of the court.*”

We have already demonstrated that this section has a direct applicability to the bankrupt’s exemption and his rights therein. The section has, as against the said property, given to the trustee all of the rights, remedies and powers of a creditor holding a lien thereon. The pre-existing creditors or creditor had no prior levy on the homestead property to reach the non-exempt portion over \$7,500, but they had the right to do so and it was this right which the trustee takes upon and against the non-exempt portion of the said property over and above the former \$7,500 exemption. Obviously a creditor, even without a lien on the homestead property would have superior rights as against the increased exemption. (See the last case of *Sampsell v. Straub*, 194 F. 2d 228, for a discussion of these rights.)

The General Principle of Uniformity and Equal Treatment of the Creditors of the Bankrupt.

We have seen the manner in which the lower court gave treatment to these pre-existing creditors. However, bankruptcy does not dispose of the rights of the creditors of a general class in that manner. Under Section 70c the trustee for the benefit of the whole body of creditors takes this right which the creditor had as to such property, *i.e.* the non-exempt portion.

Our office presented that case of *Moore v. Bay*, 284 U. S. 4 to the United States Supreme Court in 1931. The case came from the United States Court of Appeals for the Ninth Circuit. The decision by Mr. Justice Holmes involved a question pertaining to a void chattel mortgage and the right of distribution to the general body of creditors. From the decision at page 5:

“The trustee in bankruptcy gets the title to all property which—prior to the petition he (the bankrupt) could by any means have transferred *or which might have been levied upon and sold under judicial process against him.* . . . What is thus recovered for the benefit of the estate is to be distributed in ‘dividends of equal percentum on all allowed claims.’” (Emphasis ours.)

Under that decision the trustee took title to property which might have been levied upon and sold under judicial process by creditors. Obviously the pre-existing creditors under California law could have levied upon this homestead property to reach the exemption beyond the amount of \$7,500. This is the right which the trustee takes for the benefit of all creditors.

**There Passes to the Trustee as an Asset That Portion
of the Property Which Was in Excess of the
\$7,500 Exemption.**

Under the pronouncement as contained in *Moore v. Bay*, many thousands of bankruptcy administrations have been regulated. The assets transferred or lien on which was void or unenforceable as to anyone of the creditors, was brought into the bankruptcy administration for the benefit of the entire body of creditors and not for the benefit of the single creditor whose right the trustee acquired.

Conclusion.

We respectfully submit that the decision of Referee Wyman and of United States District Judge Edward P. Murphy should be reversed:

1. The bankrupt is entitled to a homestead exemption with a \$7,500 valuation.
2. The trustee has the right of the pre-existing creditors as against the whole property in possession of the bankrupt and the increased exemption is therefore not allowable against the trustee; that Section 6 does not supersede, control or eliminate the right of the trustee under Section 70c.
3. The trustee for the benefit of all creditors is entitled to receive in the bankruptcy administration the surplus valuation over and above the said exemption and to that extent and for that purpose the bankruptcy court should set aside the exemption to which the bankrupt is entitled and administer the surplus of the homestead property.

4. Accordingly the pre-existing creditors should not be permitted to or should not be directed to go into the state court for settlement of their rights as against the homestead property to reach the valuation beyond the amount of \$7,500.

Respectfully submitted,

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May 28, 1956.

No. 14,953

United States Court of Appeals
For the Ninth Circuit

JOHN O. ENGLAND, Trustee of the Estate
of Daniel E. Sanderson, Bankrupt,
Appellant,
VS.

DANIEL E. SANDERSON, Bankrupt,
Appellee.

APPELLANT'S CLOSING BRIEF.

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United States Court of Appeals For the Ninth Circuit

JOHN O. ENGLAND, Trustee of the Estate
of Daniel E. Sanderson, Bankrupt,

Appellant,

vs.

DANIEL E. SANDERSON, Bankrupt,

Appellee.

APPELLANT'S CLOSING BRIEF.

MISSTATEMENT OF FACTS BY APPELLEE

Appellee throughout his brief erroneously states that he, the bankrupt, had only one creditor whose claim arose before the September 15, 1953 amendment to Section 1260, California Civil Code, increasing the California homestead exemption from \$7,500.00 to \$12,500.00. The finding of the referee was that there was "at least" one such creditor (Tr. p. 16), and the district judge referred to "creditors" (Tr. p. 67). Appellee's verified Schedule A-3 accompanying his petition in bankruptcy, which is part of the record on appeal, discloses that he had forty-one creditors who became such in 1952 and 1953 and whose claims totaled \$18,440.01; whereas thirty-one

creditors with \$5,752.98 worth of claims arose subsequent thereto.¹ We have omitted reference to those claims which are set forth as being contingent or disputed.

SUMMARY OF APPELLANT'S POSITION

Appellant's position will be more fully stated hereafter in connection with his reply to specific points advanced by appellee.

The major premise conceded by all is that under Section 6 of the Bankruptcy Act the District Court sitting in bankruptcy is required to allow to the bankrupt the exemptions prescribed and in force at the time of the filing of the petition in bankruptcy in the state of the bankrupt's domicile—California in the instant case.

The next premise is the well-settled rule that the federal court is bound by the construction given such statutes by the highest court of the states construing the statute.

3 Remington on Bankruptcy, Section 1294;
Dixon v. Koplar (CCA 8th), 102 Fed. 2d 295;
West v. American Tel. & Tel. Co., 311 U.S. 223,
 85 L. Ed. 139, 61 S. Ct. 179.

¹While the principle might be the same were there only one creditor, in view of the \$18,000.00 indebtedness which arose prior to 1953, this court is not called upon to determine the applicability of the doctrine of *Moore v. Bay*, infra, to a situation where the property is worth, for example, \$12,500.00, and less than \$5,000.00 worth of indebtedness arose in 1952 and 1953.

In almost every state, including California, the state courts have held that where an exemption is enlarged the amendment gives no right to the debtor as against creditors whose claims arose prior to the amendment.

In re Rauer's Collection Co., Inc., 87 C.A. 2d 248, 196 Pac. 2d 803.

(See also note in 93 A.L.R. 177 collecting many cases throughout the country on the subject.)

The Supreme Court of the United States, in *Edwards v. Kearzey*, 96 U.S. 595, 24 L. Ed. 793, held a provision in the Constitution of North Carolina which exempted from sale a homestead to be invalid as regards contracts made before the adoption of the Constitution. The court, at page 799, stated:

“The remedy subsisting in a State when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is, therefore, void.”

This is but another way of saying that in *every* exemption statute there is an implied provision that any amendment thereof substantially increasing the amount of the exemption will not affect an existing creditor.

The trustee in setting aside exempt property sets aside the exemption allowed by state law as against the oldest creditor in point of time—in the instant

case, a \$7,500.00 exemption. (*In re Fox* (D.C.S.D. Cal.), 16 Fed. Supp. 320)²

One of the reasons for this rule is that as against at least some of the creditors of the bankrupt, the exemption was only \$7,500.00; hence that was the exemption allowed the bankrupt by the laws of California in force at the time of the filing of the petition. To set aside to the bankrupt under such circumstances a \$12,500.00 homestead would be to give him, in bankruptcy, \$5,000.00 more than the exemption laws of California provide. It is not difficult to assume a situation where a petition is filed shortly after the amendment of the state law and all the claims of creditors arose before the effective date of the amendment.

Involved in the instant case is the title of the trustee to assets of the bankrupt. The trustee, under Section 70a of the Bankruptcy Act, takes title to all property not exempt. If only \$7,500.00 is exempt, the trustee takes title to the excess.

Kilgo v. United Distributors (CCA 7th), 223 Fed. 2d 167;

In re Miller, 95 Fed. 2d 441;

Bank of Nez Perce v. Pindel (CCA 9th), 193 Fed. 917, 28 ABR 69.

In *Kilgo v. United Distributors*, supra, the court stated:

²Appellee, at page 18 of his brief, states that the District Court in the *Fox* case held the automobile exemption invalid as to a particular creditor. The court held it invalid as against the *Trustee*.

“It is well settled that when it becomes apparent the homestead property does not exceed the exemption, it is the duty of the Trustee to disclaim it as property of the bankrupt; and one holding a waiver, as here, may enforce his claim in the state court without regard to bankruptcy. 161 A.L.R. 1015 and authorities cited. If an appraisal establishes a value in excess of the homestead, the trustee may sell the property and pay the bankrupt the amount provided under the Constitution, *adding the excess to the fund for distribution to the general creditors.*” (Emphasis added)

The California statute setting up the procedure for reaching the excess is found in Sections 1245 et seq. of the Civil Code. The statute gives an *execution creditor* the right to have the property appraised, and provides that if the property is found to be worth more than the statutory exemption, it should be sold and the value of the homestead exemption given to the bankrupt and the excess used to satisfy the creditor's claim. Similar statutes have been construed to give the trustee the right to sell the property, pay the bankrupt the amount of the exemption and distribute the balance as assets of the estate (*In re Miller*, supra).³

Under the provisions of Section 70c of the Bankruptcy Act the trustee is vested with the rights of

³This court has held on at least two occasions that before the property is sold the bankrupt should, as a matter of equity, be given the opportunity of paying to the trustee the difference between the homestead exemption and the value of the property. (*Bank of Nez Perce v. Pindel*, supra, and *Russell v. Laugharn*, 20 Fed. 2d 95.)

a lien creditor as against this excess value over the homestead exemption as construed by the California courts, to wit, \$7,500.00. (We have heretofore pointed out that this Court has held that Section 70c is applicable in determining the validity of a homestead. *Sampsell v. Straub*, 194 Fed. 2d 288) The trustee's presumed lien includes the claims of creditors whose claims arose before the effective date of the \$12,500.00 amendment, as well as the claims of creditors that arose thereafter.

The Supreme Court in *Moore v. Bay*, 284 U.S. 4, 76 L. Ed. 133,⁴ laid down the rule of equality of distribution; that is to say, that the claims of creditors who were entitled to take advantage of an act or omission (in that case, the failure to comply with Section 3440 of the California Civil Code) stand equally with those creditors who could not take advantage of the act or omission had bankruptcy not intervened; in other words, the recovery made by the trustee was for the benefit of all creditors including those who could not have complained in the state court.

⁴In this case the bankrupt executed a mortgage that was admittedly bad as against creditors who were such at the time of the mortgage and who became such prior to recordation, the parties having failed to comply with Section 3440 of the California Civil Code. "The question raised is whether the mortgage is void also as against those who gave the bankrupt credit at a later date after the mortgage was on record." Justice Holmes stated as one of his reasons for reversing this court: "The rights of the trustee by subrogation are to be enforced for the benefit of the estate. The Circuit Courts of Appeal seem generally to agree, as the language of the Bankruptcy Act appears to us to imply very plainly, that what thus is recovered for the benefit of the estate is to be distributed in 'dividends of an equal percentum on all allowed claims, except such as have priority or are secured.'"

COMMENT UPON APPELLEE'S POINTS

Certain arguments of the appellee require further comment.

The question of whether homestead laws are to be liberally or strictly construed (Appellee's Brief, p. 4) is not involved in the instant case. The only question is whether in applying California law the court can give the 1953 amendment a retroactive effect as against the trustee in bankruptcy. In view of the fact that the state courts have held that a creditor has a vested right in an existing exemption statute, we repeat: Neither a liberal nor a strict construction of the statute will help in answering this question.

Appellee argues that exempt property does not pass to the trustee (Appellee's Brief, p. 6). This begs the question. All that is exempt in the instant case is the first \$7,500.00 or \$12,500.00 of the value of the home, as the case may be. The bankruptcy court must determine which figure is to be applied based on the law of the state.

3 Remington on Bankruptcy, *supra*;

Dixon v. Koplar, *supra*;

West v. American Tel. & Tel. Co., *supra*.

The excess over the exemption, *regardless of what the exemption may be*, passes to the trustee.

Kilgo v. United Distributors, *supra*;

In re Miller, *supra*;

Bank of Nez Perce v. Pindel, *supra*.

There is, therefore, no quarrel with *Lockwood v. Exchange Bank*, 190 U.S. 294, 23 S. Ct. 751, 47 L. Ed.

1061 (Appellee's Brief, p. 7), nor any problem of its application to the instant case.

Appellee cites cases in his brief dealing with the rights of creditors as against whom the bankrupt has waived an exemption. In certain states, in the southeastern part of our country, it is not against public policy for a debtor to waive in advance his right to a certain exemption as against a particular creditor. (In California, such a waiver has been declared to be against public policy. *Industrial Loan and Investment Company of San Francisco v. The Superior Court*, 189 Cal. 546.) As a result it appears from the decisions in Georgia, for example, that no lending institution will loan money without such a waiver. Such a waiver is personal to the individual creditors, and therefore the bankruptcy courts in those states set aside to the bankrupt the homestead and permit the particular creditor to assert his rights in the state court as against the homestead after it is set aside. This is all that such cases as *Woodruff v. Cheeves*, 105 Fed. 601, 5 ABR 296, and *Lockwood v. Exchange Bank*, supra, hold. In the instant case we are not dealing with creditors holding a contractual waiver of homesteads personal to them, but with a group of creditors as against whom the state could not increase the homestead exemption. In the absence of bankruptcy, such creditors in California would have to obtain an execution lien on the homesteaded property to reach the excess over the \$7,500.00 exemption (California Civil Code, Section 1245 et seq.). The

trustee in bankruptcy is deemed to have such a lien by virtue of Section 70c of the Bankruptcy Act and is thus vested with title to such excess. This is a far cry from a personal waiver given by the debtor to an individual creditor which could not pass to the trustee. In order to effectuate the policy of those states which in their wisdom, or lack of it, permit advance waivers of exemption, the local federal courts must permit such a creditor to enforce his rights in the state court. The title of the trustee in bankruptcy is not involved.

In *In re Buckley*, 24 F. Supp. 832, cited by Judge Murphy in support of his order as authority for the proposition that the remedy of creditors whose rights under California law extend beyond the \$12,500.00 exemption, is in the state court (Tr. p. 67), the court, after discussing the facts and questioning the entire procedure, stated, at page 834:

“Undoubtedly, if the property was worth and there was a possibility of receiving a bona fide offer which would produce for the common creditors a substantial equity, the property could be sold free of encumbrances and *the bankrupt could claim his homestead out of the proceeds*. No such condition exists here.

The title to the property exempt under the laws of the State does not pass to the trustee, and it is his duty, when claimed, to set it aside as such when it becomes clear that the bankrupt is a person entitled to claim it, as here, *and the fair value of the property does not exceed the amount allowed by the State law.*”

One of the two primary purposes of the Bankruptcy Act is to insure equality of distribution to creditors (*Moore v. Bay*, supra; *Buffum v. Peter Barceloux Company*, 289 U.S. 227, 77 L. Ed. 1140, and *Sampsell v. Imperial Paper and Color Corporation*, 313 U.S. 215, 85 L. Ed. 1293)—the other being to enable a bankrupt to obtain a discharge and start anew. The first is the older in point of history. (See 1 Remington on Bankruptcy, Section 1, pages 3 through 5.) To relegate the forty-one creditors with claims of \$18,000.00 to the state court would do violence to equality of distribution. The first creditor to obtain a lien might absorb the whole excess value, leaving the remaining creditors without relief. In such a situation creditors would normally resort to the bankruptcy court—an avenue which would be closed to them if appellee's theory were adopted.

We are likewise not concerned with the rights of creditors having valid liens against a homestead who are relegated to the state court for the enforcement of those liens.

Ingram v. Wilson, 125 Fed. 913, 11 ABR 192 (Appellee's Brief, p. 9), involved an entirely different situation. There an individual creditor sought an order from the referee to compel the trustee to sell the homestead for his individual benefit. The trustee did not claim title and the creditor was properly relegated to the state court for any relief to which he might be entitled.

In re Vonhee, 238 Fed. 422, 38 ABR 799, and *Stein v. Bostian*, 133 Fed. 2d 586, involved cases where,

under state law, labor claimants and tax claimants, respectively, had the right to proceed against homestead property. The court rightly held that such priority claimants must seek their relief in the state court.

In re Carl, 38 Fed. Supp. 414, and *Baumbough v. L. A. Morris Plan Co.*, 30 Fed. 2d 816 (Appellee's Brief, p. 25), are not in point. In both cases there was a valid homestead, and no excess over the amount set aside to be considered.

This Court is solely concerned with the extent of the homestead to be set aside to the bankrupt, which, when the real value of the homestead is established, will determine the amount of the excess vesting in the trustee.

Brandt v. Mayhew, 218 Fed. 422, cited by appellant, also involves an entirely different situation. There the trustee attempted to defeat the homestead in its entirety by asserting that he was in the position of having liens antedating the declaration of homestead. Were the court to have adopted the theory of the trustee, the bankrupt would not have received the homestead to which he was entitled under state law.

Appellee's references to the bankruptcy powers of the federal government flowing from the Constitution are surplusage. Every lawyer knows, or should know, that "the impairment of the obligation of contracts" does not apply to the federal government. The question here is what is the law of California, and the constitutional prohibitions against impairment are part and parcel of the exemption laws of this state.

CONCLUSION

In conclusion it is respectfully submitted that under the laws of California the bankrupt is only entitled to a \$7,500.00 homestead, all value in excess thereof having passed to the trustee in bankruptcy.

Accordingly the decision and the order of the District Court should be reversed, and the District Court should be directed to enter an order approving the trustee's report on exempt property.

Dated, San Francisco, California,
June 11, 1956.

Respectfully submitted,

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No. 14,953

IN THE

United States Court of Appeals
For the Ninth Circuit

JOHN O. ENGLAND, Trustee of the Estate
of Daniel E. Sanderson, Bankrupt,
Appellant,

vs.

DANIEL E. SANDERSON, Bankrupt,
Appellee and Petitioner.

APPELLEE'S PETITION FOR A REHEARING.

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JOHN O. ENGLAND, Trustee of the Estate
of Daniel E. Sanderson, Bankrupt,

Appellant,

VS.

DANIEL E. SANDERSON, Bankrupt,

Appellee and Petitioner.

APPELLEE'S PETITION FOR A REHEARING.

*To the Honorable Judges of the United States Circuit
Court of Appeals for the Ninth District, the
Honorables Orr, McAllister and Barnes:*

Appellee, Daniel E. Sanderson, the bankrupt herein, respectfully petitions this Honorable Court for a rehearing of the above entitled matter and for its order setting aside the opinion and judgment herein made, given and filed on September 10, 1956, assigning therefor the reasons hereinafter set forth.

PRELIMINARY STATEMENT.

For the purposes of this petition, appellee accepts that portion of the decision and opinion on file which

holds that all matters pertaining to exemption claims must be retained in, determined and enforced by and only within the jurisdiction of the Bankruptcy Court.

POINT I.

As first ground of specification, appellee respectfully urges that this Court is in error in holding that notwithstanding that the clear statutory homestead exemption existing by California statute (C.C. 1260) at the time of filing of the petition in bankruptcy herein was fixed in the sum of \$12,500, nevertheless the bankruptcy court must be guided by "the construction placed upon Section 1260 by the California courts" (see page 2 of the printed opinion). By so deciding, this Court erred in not giving force to the clear meaning of the words "prescribed by" and "state laws in force at the time of the filing of the petition" as the same are used and set forth in Section 6 of the Bankruptcy Act.

The words "prescribed by" have been given force and clear meaning in many decisions, and, almost without dissent, they hold that these words *mean statutory law, and statutory law only*. The latest expression of the California courts is found in (1955) *Gilliam v. California Emp. Stabil. Comm.*, 130 Cal. App. 2d 102, 114 (hearing denied by California Supreme Court), where the court states:

"It is a general law of statutory construction that where an act of the Legislature refers to 'laws', the expression will be held to refer to stat-

ute law, rather than to the common law, unless the context requires a different construction. In *Southern Bell Tel. & Tel. Co. v. Beach* (1911) 8 Ga. App. 720 (70 S.E. 137), the Georgia statute provided for attorney's fees in actions for damages for injury due to the failure of a common carrier to perform any act required by 'any law' of the state. Referring to the act which the telephone company had failed to perform, the court said: 'In a broad sense, it was a violation of the law of the state of Georgia, for the common law is a part of the law of the state of Georgia' * * * The court then referred to the rule of statutory construction above mentioned and pointed out that in *Brinckerhoff v. Bostwick*, 99 N.Y. 654 (1 N.E. 663), it is held that expressions in statutes, such as "required by law", "prescribed by law", "regulated by law", etc., refer to statutory provisions only; and the expression "liability created by law" as used in the Code of Civil Procedure was held to refer only to statutory liability, and not to liabilities recognized by the general law. Constitutional provisions that the attorney general shall perform such duties as may be prescribed by "law" mean statute law (*State ex rel. McKittrick v. Missouri Public Service Commission*, 152 Mo. 29 (175 S.W. 2d 857); *Shute v. Frohmiller*, 53 Ariz. 483 (90 P. 2d 998))."

Many other cases are in accord with the principle of statutory construction which is stated in the foregoing *Gilliam* case, viz.:

Arizona:

Shute v. Frohmiller, 90 P. 2d 998, 1001.

California:

Exline v. Smith, 5 Cal. 112, 113;

Duran v. Pickwick Stages System, 140 Cal. App. 103.

Idaho:

Howard v. Cook, 83 P. 2d 208, 210.

Missouri:

McKittrick v. Mo. Public Service Comm., 175 S.W. 2d 857.

New Mexico:

Ex parte De Core, 136 P. 47, 52;

New York:

Brinckerhoff v. Bostwick, above cited, 1 N.E. 663;

People v. Santa Clara Lumber Co., 106 N.Y.S. 624, 626;

Bd. Education v. Town Greenburgh, 13 N.E. 2d 768, 770.

Utah:

Winters v. Hughes, 24 P. 759, 761.

West Virginia:

Lawson v. Kanawha County Court, 92 S.E. 786, 789.

Furthermore, judicial decision is not "law". It is merely evidence of what the law is, and a change of decision is not the promulgation of a new law. (Iowa) *Swanson v. City Ottumwa*, 106 N.W. 9, 13. This is merely repetitive of the statement long ago

made by Justice Story in the case of *Swift v. Tyson* 41 U.S. (16 Pet.) 1, 10 LE 865, and which has found concurrence in later cases, including *U. S. Savings & Loan Co. v. Harris*, 113 F. 27, 35. The reason that judicial decision is not considered “law” is that decisions are—

“often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, ill-founded, or otherwise incorrect” (*U. S. Savings & Loan Co. v. Harris*, supra, at p. 35).

There should be no uncertainty about the meaning of the “law” of exemption. It should be fixed and made certain and unequivocal. The decision of this Court does not make for such certainty. It is respectfully urged that this Court should give a clear-cut decision as to the meaning of the statutory expressions used by Congress in Section 6 of the Bankruptcy Act, which the opinion and decision herein rendered fail to do.

POINT II.

As a second ground of specification of error, petitioner respectfully urges that the effect of the announced decision is to hold that Congress cannot, in matters of bankruptcy, control the rights of exemption of bankrupts, but that it has left this up to the decisions of state courts on the subject. To do so (i.e., give or withhold the specified right of exemp-

tion), we repeat, overlooks and cancels out the clear meaning and intent of Congress in announcing its mandate in Section 6 of the Bankruptcy Act to the effect that exemptions to bankrupt are to be allowed as "prescribed by" "State laws in force" at the time of the filing of the bankruptcy petition. The decision of this Court means that exemption rights are never fixed with certainty, but are at all times subject to invasion, expansion or diminishment at the whim and fancy of state court decision, and fluctuating judicial policy, and is particularly wrong where the state court decisions which are used as guiding posts for the determination in bankruptcy proceedings themselves had nothing to do whatsoever with bankruptcy matters. Such a case was the *Rauer* case (82 Cal. App. 2d 248), relied upon by this Court, which is now used by this Court as a yardstick to determine the measure of exemption rights under the federal bankruptcy statute. *Rauer* merely held that the proscription of the Constitution against invasion of contractual rights by STATES had to be recognized by the California courts and that therefore an increase of an exemption as to a creditor then in existence would invade his rights of contract. That has nothing to do with bankruptcy. The effect of bankruptcy was not alluded to or considered. Yet this Court now holds that the *Rauer* case in effect constricts and limits the action (i.e., legislative action) of Congress. Respectfully, appellee fails to see how such a conclusion logically or reasonably follows. The decision of this Court does not give effect whatever to state "law" but to something entirely different, namely, state "de-

cision''. This certainly could not have been, and is not, the intent of Congress.

POINT III.

The third point that petitioner urges upon this Court is that the decision in effect holds that the constitutional proscription against invasion of contracts (by state action) applies equally to congressional action (i.e., the Bankruptcy Act). This is NOT the law. The Bankruptcy Act by its very nature is an Act which invades the obligation of contracts the moment it is invoked by persons entitled thereto. No matter how valid a prior debt, no matter the size of that debt, no matter how founded (except as to certain specified exceptions), a bankrupt is nevertheless entitled to his discharge of that debt when he goes through bankruptcy and receives his discharge. Can the creditor complain? Certainly not, but this is clearly an invasion of his ordinary contractual rights. The reason that he cannot complain is simple: The constitutional proscription does not apply to federal action (see *Re Chicago etc. Ry. Co.*, CCA 7th, 72 F. 2d 443, 452). Congress can do what it pleases in the field of bankruptcy because the Constitution singles out that phase of action for congressional determination and by Congress alone (U. S. Const., Art. I, Sec. 8). It is a prime principle of law that a person contracts with reference to laws in effect at the time of the making of any contracts. The Bankruptcy Act is such a law. It is the law of the

whole land, uniform throughout. The creditor therefore knows, or is bound to know, that his rights are subject to cutoff or cancellation by bankruptcy. It matters not that he is a "prior" or "subsequent" creditor. There is no such distinction. No matter when he contracts with one who subsequently becomes bankrupt, he contracts with the specific probability that his rights can thereafter be affected by the bankruptcy. It certainly is no invasion of his rights to hold, as Congress intended and so clearly specified, that the laws "in force" at the time of the bankruptcy should govern. To consider here the doctrine of impairment of obligation of contracts is to inject into, and consider a false quantity in, our case.

The decision announced by this Court, therefore, clearly runs contrary to and overlooks the principle that the prohibition against impairment of contracts does not apply to Congress or the Bankruptcy Act.

POINT IV.

The fourth point which is urged upon this Court by petitioner is that the decision of this Court is not in keeping with, and runs contrary to, the spirit and intent of the Bankruptcy Act. Instead of giving full relief to debtors, the decision actually takes away and denies them the relief which Congress intended that they should have. In our case particularly, it takes away \$5,000 of a bankrupt's equity in property (given to him by state law) at one stroke by concluding that the state courts, and not Congress, should determine

what an exemption should be. That certainly was never the intent of Congress. If it had desired to use an expression in the Act which would have modified its express direction and mandate as to the allowances of exemptions, then instead of using the words "prescribed by" and "in force" in Section 6 of the Bankruptcy Act, it could easily have stated that exemptions should be allowed to the extent, and only to the extent, that they are allowable as to any creditor under and by state law "or decision". But since Congress did not so modify or limit the otherwise clear meaning of its words, then in keeping with the spirit and intent of the Bankruptcy Act, the exemption that should be allowed to the bankrupt as specified by the clear, plain and certain meaning of Section 6, should refer to statutory law and none else. In this case it means the allowance of a \$12,500 homestead exemption under Section 1260 of the California Civil Code, nothing less and nothing more. The decision of this Court fails to recognize the spirit and intent of the Bankruptcy Act and the clear meaning of Section 6.

POINT V.

The fifth, and final, point that petitioner urges is that under Section 6 of the Bankruptcy Act, there was no \$7,500 exemption "law" in existence at the time of the filing of the petition in bankruptcy, and hence not "in effect". All that was in effect was the latest law on the subject. This Court, by its decision, however, gives effect to a dead law which

was superseded the moment that the amendment to the homestead section became effective. The superseding (and presently effective) law was the enactment of a \$12,500 homestead limitation. The effect of the amendment was to—

“* * * substitute for the original statute or section, continuing in force that which is reenacted and repealing what is omitted.”

Pierce v. County Solano, 62 Cal. App. 265, 269;
People v. Western Fruit Growers, 22 Cal. 2d 494 at 501.

Hence, for this Court to give effect to an exemption amount which is no longer in existence is to give effect to a law which is not “in effect” “at the time of the filing” of the bankruptcy petition. It gives effect to a “law” long since superseded. Congress specified no saving clauses in Section 6 and its plain meaning should not be disturbed or distorted.

SUMMARY.

To summarize: Legislation which deals with bankruptcy is not subject to the same constitutional limitations as legislation which deals with other subjects, since bankruptcy contemplates a discharge of the debtor's debts, and this is itself an impairment of contractual obligations. Bankruptcy power, which overrides all state law, is granted to Congress by the federal Constitution. In proceedings brought under the Bankruptcy Act, that Act alone is decisive of all questions arising in such proceedings. The fact

that a different rule as to homestead exemption rights could and does apply in bankruptcy proceedings than is applied in proceedings which do not involve bankruptcy is a false and immaterial consideration, since it is the Bankruptcy Act itself which puts those bankrupts who avail themselves of its broad protective powers in a privileged class. For many years Section 6 of the Bankruptcy Act has provided for exemptions prescribed by state laws in force at time of the filing of the bankruptcy petition. The Act refers only to state laws "in force" at that time, and the only "laws" "in force" are statutory laws on the books at the time of the filing of the petition in bankruptcy (see *Re Klumpe*, Cal. 1948 CCH Bankruptcy).

It is respectfully submitted that the importance of the determination herein, which affects bankruptcies throughout the breadth of these United States, should require a rehearing and a further consideration of the matter, and also for the purpose of complete clarity and freedom from uncertainty.

Dated, San Francisco, California,
September 24, 1956.

JEFFERSON E. PEYSER,
By LEONARD S. LURIE,
*Attorneys for Appellee
and Petitioner.*

LEONARD S. LURIE,
Of Counsel.

CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition for a rehearing is, in our opinion, well founded in fact and in law and is not interposed for delay.

Dated, San Francisco, California,
September 24, 1956.

JEFFERSON E. PEYSER,

By LEONARD S. LURIE,

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and Petitioner.*

